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No. 422

In the Supreme Court of the United States

OCTOBER TERM, 1952

ROBERT W. BURNS AND HERMAN P. DENNIS, JR.,
PETITIONERS

v.

ROBERT A. LOVETT, SECRETARY OF DEFENSE, THOMAS K. FINLETTER, SECRETARY OF THE AIR FORCE, GENERAL HOYT S. VANDENBERG, CHIEF OF STAFF, UNITED STATES AIR FORCE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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Rigby, *Military Penal Law: A Brief Survey of the 1920 Revision of the Articles of War* (1921), 12 J. Crim. L. and Criminology 84 — 53
Wallstein, *The Revision of the Army Court-Martial System* (1948), 48 Col. L. Rev. 219 — 55–56
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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The memorandum opinions of the District Court are reported at 104 F. Supp. 310 and 312 (R. 18–20). The majority and dissenting opinions of the Court of Appeals (R. 21–44, 44–56) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 31, 1952 (R. 57), and amended on

August 25, 1952 (R. 58). The petition for a writ of certiorari was filed on October 29, 1952, and was granted on December 15, 1952. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a review of courts-martial judgments by civil courts in habeas corpus proceedings is limited to an inquiry as to whether the courts-martial had jurisdiction in the traditional sense, and whether the habeas corpus petitions in this case raise such jurisdictional issues.

2. If the civil courts have competence to inquire generally whether due process has been accorded in the court-martial proceedings, whether, on petitions for habeas corpus alleging violations of due process in court-martial proceedings, petitioners were entitled to a hearing on factual issues which had been examined and found groundless in the military appellate processes.

STATUTES INVOLVED

The statutes involved are set forth in Appendix A, *infra*, pp. 83–87.

STATEMENT

Petitioners Burns and Dennis, Staff Sergeant and Private in the United States Air Force, stationed in Guam, were separately tried in May 1949 by courts-martial in Guam and convicted of the murder and rape of Ruth Farnsworth, in violation of the 92nd Article of War. Each was

found guilty of the offenses charged and sentenced to death (R. 1, 7, 9, 16, 18). After exhausting the processes of military review, set forth in detail below (*infra,* pp. 18–28), during which their sentences were confirmed by the President, they filed the instant petitions for writs of habeas corpus in the United States District Court for the District of Columbia. The respondents are the officials under whose authority petitioners are in custody in Japan, awaiting execution (R. 1–5, 9–15).[1] The District Court denied the petitions without hearing witnesses (R. 20), and the Court of Appeals affirmed, with one dissent (R. 57).

I

THE ALLEGATIONS OF THE HABEAS CORPUS PETITIONS

Petitioners contend that their detention is unlawful because the courts-martial, having denied them due process as a result of certain alleged irregularities in the conduct of their trials, had lost jurisdiction over them. The irregularities alleged in the habeas corpus petitions are as follows:[2]

1. *Unlawful detention.*—That on January 7, 1949, after being surrendered by military au-

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[1] Petitioners, although outside the territorial jurisdiction of any federal court, seem to have "standing to invoke the process of federal courts somewhere." *Johnson* v. *Eisentrager*, 339 U. S. 763, 790; compare *Ahrens* v. *Clark*, 335 U. S. 188.

[2] Attached to the petitions are affidavits by petitioners, their accomplice Calvin Dennis, and certain other persons.

thorities, petitioners were arrested and placed in custody of civil authorities on Guam,[3] where, without arraignment, they were held incommunicado in solitary confinement, not allowed to consult with counsel, "subjected to continuous questioning, beaten, denied sleep and edible food," in violation of the Penal Code of Guam and the United States Constitution, until their return to the custody of the Air Force several weeks later (R. 2–3, 10–11, 13). During his detention; Herman Dennis, "without being advised of his constitutional rights against self-incrimination had taken from his person certain public hairs which were subsequently used as evidence against him" (R. 12).

2. *Coerced confessions.*—That, as a "result of physical duress, protracted interrogation, the use of a lie detector, threats" that he would receive the death sentence if he did not confess and promises of leniency if he did, and "various subterfuges", and without being adequately advised of his rights against self-incrimination, Herman Dennis gave four confessions, which also implicated Burns (R. 11, 12, 13).

3. *Denial of counsel of petitioners' choice, or effective assistance of counsel.*—That counsel se-

[3] The United States Navy furnished and supervised the government of Guam, and the Guam officials involved in these cases were Navy or Marine officers or civilians employed by the Navy.

lected by Burns "had only one day to prepare his defense, thereby depriving petitioner of his right to effective counsel" (R. 4); that Dennis was denied a "request for counsel of his choice," the counsel furnished him "did not take adequate time to prepare" his defense (R. 12), and he had no opportunity for advice until "shortly" before his trial (R. 11).

4. *Suppression of evidence and perjured testimony.*—That certain "important evidence tending to show" petitioners' innocence was suppressed by the prosecution (R. 4, 12); that Calvin Dennis, charged with the same offenses, whose testimony alone directly connected Burns with the crimes charged, admitted in a sworn statement that his testimony was perjured as a result of "threats and promises of special consideration if Calvin Dennis agreed to testify against" Burns (R. 4, 3);[4] that the prosecution "sought to procure witnesses to perjure themselves" against petitioner Herman Dennis, "and intimidated and threatened those who sought to help" him (R. 12); that specimens of hair attributed to Herman Dennis "were deliberately planted in an effort to create evidence tending to show his guilt" (R. 13).

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[4] Burns also alleges that the "fruits" of the alleged coerced confessions of Herman Dennis were used against him (though these confessions were not themselves introduced at Burns' trial and Herman Dennis did not testify at Burns' trial); that "continued pressure and intimidation were used

5. *Trial in an atmosphere of terror.*—That their trials were "conducted in an atmosphere of terror, hysteria and vengeance" (R. 4, 12–13).[5]

II

THE PROCEEDINGS BEFORE THE MILITARY TRIBUNALS

Rules to show cause issued in each case, and respondents filed motions to dismiss, annexing the records of the courts-martial and the opinions and findings made by the Air Force authorities during the military appellate processes (R. 5–8, 15–18). From these exhibits, the following appears:

A. THE PROCEEDINGS AT THE COURTS-MARTIAL

Petitioner Herman Dennis was tried first, at a court-martial lasting from May 9, 1949, to May 16. Burns' trial commenced on May 27, 1949, and concluded on May 30. Both courts were composed of officers not stationed in Guam (mainly from Japan), and a wholly separate panel sat on Burns' court (TR (D) 2; TR (B) 2).

At both trials, the prosecution showed that on December 11, 1948, Ruth Farnsworth, a civilian Government employee, disappeared, under mys-

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to get him [Burns] to confess" (R. 3); and that, failing this, threats and promises were used to get Herman Dennis and Calvin Dennis to testify against him (R. 3).

[5] Dennis also alleges that certain "prejudicial statements were introduced into the record that were irrelevant, immaterial, inflammatory and calculated to prejudice petitioner's cause" (R. 12).

terious circumstances, from the Jade Shop, a privately-owned, general-merchandise store on Guam in which she worked on a part-time basis (TR (D) 21–29, 83, 127; TR (B) 14–17, 27).[6] On the morning of December 13, 1948, she was found lying unconscious, though gasping for breath, in a small clearing in the jungle, a short distance behind the Jade Shop (TR (D) 36–37, 42–43; TR (B) 31–33, 37–38). Her face and neck were abraded, bruised, dirty, and bloody (TR (D) 38, 42–43; TR (B) 33, 38). She was unclothed below her waist and her thighs were scratched (*id.*). She died on the morning of December 14, 1948 (TR (D) 47; TR (B) 45–46). An examination of her body revealed that she was brutally beaten about the head and body, choked and raped (TR (D) 51–56; TR (B) 48–51).

1. *The proceedings of Dennis' trial*

a. ***Evidence connecting Dennis with the crime.***—In addition to the evidence relating to the disappearance and death of Miss Farnsworth, *supra,* pp, 6–7, the prosecution showed that Herman Dennis and Sergeant Burns were seen

[6] The symbol TR (B) refers to the typewritten copy of petitioner Burns' trial minutes and the symbol TR (D) to that of petitioner Dennis, both of which have been filed with the Court. The respondents' Exhibits cited herein were attached to the respondents' return to the rules to show cause, and have also been filed with the Court.

loitering around the Jade Shop on the evening of December 11, 1948, prior to Miss Farnsworth's disappearance (TR (D) 86–89). About 10 p. m. that night, Herman Dennis was given a ride to his base by a civilian driver of a weapons carrier at a point on the highway about three quarters of a mile from the Jade Shop (TR (D) 97–102). Laboratory analysis showed that certain head and pubic hairs found in the Army truck used by Calvin Dennis on the night of December 11th and the blankets found therein, as well as the head hairs found on one of Herman Dennis' shirts, were similar in all characteristics to the hair of Ruth Farnsworth, while the other pubic hairs found in the same truck and blankets were identical in their characteristics with hairs taken from Herman Dennis (TR (D) 153–155, 155–162, 163–166, 173–181, 182).[7]

b. *Dennis' confessions.*—There were also admitted in evidence four statements by Herman Dennis (TR (D) 275; Pros. Exs. 40–43), in which he admitted that on December 11, 1948, between 6 and 8 p. m., together with Burns and Calvin Dennis, he arrived at the Jade Shop in a truck driven by Calvin, that they entered the shop, that Burns struck and knocked Miss Farnsworth

[7] Similarly, Miss Farnsworth's smock which was found in the truck contained two types of pubic hairs identical in all characteristics and color to those of the victim and Herman Dennis, respectively (TR (D) 165–168, 168–171, 171–172, 184–186).

to the floor, that he (Herman Dennis) put out the lights and helped carry the victim to the truck in which she was taken to a clearing in the jungle behind the shop, and that he committed three acts of sexual intercourse with the unconscious victim. He then left the scene and "thumbed a ride" back to his base in a weapons carrier.

Before being admitted, these statements were subject to an inquiry by the court as to their voluntariness, and the following facts were adduced by the prosecution:—On January 7, 1949, Herman Dennis, together with other airmen, was asked to volunteer for a "lie detector" test, which was being administered by a civilian criminologist under the supervision of the Assistant Chief of Guam naval police (TR (D) 187–188, 207–209, 217). After the mechanics of the test were explained to him and he was advised of his right to refuse to submit thereto and to remain silent, he voluntarily consented, in writing, to submit to such test (TR (D) 187–188, 194, 195, 208, 217, 224). At the conclusion of the test, he was told that "his test was not what it should be," and he was placed under arrest by the naval police authorities. Instructions were given that he would not be permitted to communicate with anyone other than the two investigators conducting the test. (TR (D) 221, 225, 226, 193–194, 209, 214, 331–332.) Later that day and again on January 8

and 10, he was interrogated briefly concerning the crime, but he made no incriminating statements (TR (D) 189–191, 199, 209, 218–219).[8]

On the evening of January 11, 1949, after being warned of his rights against self-incrimination, he was interrogated by a civilian criminologist and the assistant chief of naval police, both of whom told him that Calvin Dennis had confessed, implicating him (TR (D) 189–191, 196–197, 198, 199, 204–205, 210, 219, 163). After Calvin, who was brought into his presence, admitted making a confession, Herman Dennis was left alone with pad and pencils (TR (D) 189, 209, 210, 261). Later that evening, Herman Dennis handed the assistant police chief two statements in his handwriting, only one of which was signed, admitting his part in the rape of Miss Farnsworth (TR (D) 192, 210–212, 275, 285).

On the morning of January 12, 1949, Herman Dennis, with his consent, was taken to the office of the chief of police, where, after being warned of his constitutional rights, he signed a typewritten statement in question and answer form, in which he enlarged upon his original confession (TR (D) 192–194, 212–213, 214, 215, 227, 230–231, 261). After making this statement, he proceeded to reenact his part in the crime, but, in the course of tracing the route of the crime, he refused to

[8] On January 8, 1949, at the request of the investigators, Herman Dennis extracted from his body some pubic hairs for use in laboratory analysis and comparison with hairs found on his shirt and in blankets found in the army vehicle commonly used by Calvin Dennis (TR (D) 155–162).

complete it, stating "Please, I don't want to go any further" (TR (D) 278–283, 284–285, 34–36). The following morning, again after being warned of his rights, he signed another typewritten statement in question and answer form, which further amplified his original confession (TR (D) 213–214, 216, 275, 285). Several days later he was civilly arraigned (TR (D) 227) and on January 29, 1949, was transferred for confinement by military authorities (TR (D) 331).

Petitioner Dennis testified, on the inquiry into the admissibility of the confessions, that, following his arrest, he had been allowed no visitors except a Chaplain, that he had been subjected to protracted interrogations, received no warning of his rights, was promised leniency if he confessed and death by hanging, dramatized by a display of photographs of a victim of a hanging, if he did not.[9] He did not, however, claim that he had been beaten, but expressly said that he had not been (TR (D) 253); 4 CMR (AF) at 895–896).

After hearing the testimony, the court-martial received the four statements in evidence with

[9] There was also some defense testimony that at a social gathering in March, 1949, the assistant police chief, in response to an inquiry from Lieutenant Colonel Daly as to how he obtained the confessions, replied, "Oh, you know how we do it. We kind of give them the business or rough them up" (TR (D) 238, 236–238). On cross-examination it was shown that the question was asked and the answer given in a "joking," or "jovial manner" (TR (D) 237, 238).

instructions that their admission in evidence was not conclusive as to their voluntary nature and that they were not to be considered by any member of the court on the question of guilt unless he found the confessions to have been voluntary (TR (D) 187–233, 233–235, 239–253, 254–260, 260–264, 275, 285; Pros. Exs. 40–43; Def. Exs. A, B, TR (D) 242).

c. *Assistance of counsel.*—At the opening of the trial, on May 9, 1949, Dennis stated: "I desire the regularly appointed defense counsel but do wish to have Lieutenant Colonel Edward F. Daly to assist" (TR (D) 3). The law member of the court ruled that, since the Department of the Air Force at Washington concurred in the Commanding General's determination that Lieutenant Colonel Daly was not available as Herman Dennis' defense counsel, such determination was controlling (TR (D) 4).

In connection with this ruling, the following facts were shown:—On February 1, 1949, Dennis was charged with a violation of the 92nd Article of War (*infra,* p. 87), in two specifications. On February 4, 1949, he indicated to the pre-trial investigating officer that he did not particularly desire any civilian defense counsel, but that he did desire Lieutenant Colonel Tolen for his counsel (TR (D) App. 2). On April 8, 1949, Lieutenant Colonel Tolen was formally appointed as defense counsel, to be assisted by Captain Katz and First Lieutenant Ensley, all of whom, on

March 21, 1949, had been similarly assigned as counsel for Burns (TR (D) 1, 9–9A; TR (B) 1). Lieutenant Colonel Tolen had represented Dennis throughout the six-week pre-trial investigation, and Captain Katz commenced his participation as one of Dennis' counsel a month before trial (TR (D) 10). After receiving the notification of appointment of counsel, Dennis requested, in writing, that Lieutenant Colonel Daly be appointed as special defense counsel "and that he be assisted by such of the regularly appointed defense counsel that he may desire" (TR (D) App. 3, p. 1). On April 12, 1949, after the Commanding General had ruled that Lieutenant Colonel Daly was "not available" under Article of War 17 (10 U. S. C., 1946 ed., 1488), Dennis stated in writing that he "still" desired him for his counsel (*id.* at p. 2). On April 13, 1949, Lieutenant Colonel Daly sent Dennis a letter, stating, "that in view of the fact that I actively participated in the investigation of the case and was responsible for the production of much of the evidence in connection therewith, and may be called to testify for the prosecution * * * I can not conscientiously defend you and do not desire to defend you or any of the other accused in connection with the crime" (TR (D) App. 4).

On April 15, 1949, the Commanding General wrote Herman Dennis that since the latter had originally selected Lieutenant Colonel Tolen for his counsel, "Colonel Daly was free to be assigned

an active part in the preparation of the government's case," and that consequently he was "not available" as defense counsel (TR (D) App. 6). The following day Herman Dennis replied that despite Lieutenant Colonel Daly's "connection with the case," he "still" desired "him to represent me if I can have him" (TR (D) App. 5). On April 16, the Commanding General "reluctantly" declared Lieutenant Colonel Daly available to act as Dennis' "individual defense counsel to be assisted by the appointed defense counsel" (TR (D) App. 7).

On April 18, 1949, the Commanding General reversed his own decision and notified Dennis that Lieutenant Colonel Daly would "not be available," because he was "under psychiatric examination pending his own arraignment under charges of numerous alleged acts of misconduct" (*id.*). This ruling was confirmed by the Department of the Air Force in Washington. On April 19, 1949, Dennis sent a letter to the Commanding General, stating, that "In view of the contents of your letter of 18 April 1949, I do not desire the services of Lt. Colonel Edward F. Daly and I will accept the regularly appointed defense counsel" (TR (D) App. 8). The appointed defense counsel did not know until the day the trial began (May 9) that Dennis still desired Lt. Col. Daly as one of his defense counsel (TR (D) 4).

d. *Dennis' defense.*—Dennis testified in his own behalf. His testimony was to the effect that from

about 7:45 p. m. until 9:30 p. m. on December 11, 1948, he attended a movie at his base, after which he stopped at the enlisted men's club, before retiring to his barracks around 11 p. m. (TR (D) 311). Several other airmen testified, more or less firmly, that they had seen him at the movie or going into or leaving it, and there was some other evidence intended to discredit some of the prosecution testimony (TR (D) 287–310).

2. The proceedings at Burns' trial

a. ***Evidence of Burns' connection with the crime.***—At the trial of Burns, the prosecution, after adducing evidence on the disappearance and death of Miss Farnsworth, *supra*, pp. 6–7,[10] presented Private Calvin Dennis,[11] one of the accomplices named in the charge against Burns, who, after being warned of his constitutional rights against self-incrimination and of his right to refuse to testify (TR (B) 53), testified as follows:

[10] The prosecution also adduced evidence showing that the various hairs taken from Calvin Dennis' truck and from the blankets and the smock found therein were identical in their characteristics with those of the hairs taken from Miss Farnsworth's body and from Herman Dennis (TR (B) 92, 99–104, 114, 116, 121, 122, 123–129, 131–133).

[11] Calvin Dennis had, at the time of the Burns trial, been convicted by another general court-martial on the same charges and sentenced to death (TR (B) 56). The sentence was later commuted to life imprisonment by the President. See *United States* v. *Dennis*, ACM 1894, Calvin Dennis, 4 CMR (AF) 930, 956. He has not brought a habeas corpus proceeding.

About 8 p. m., on December 11, 1948, Calvin Dennis, who had extra duty driving an army truck as a shuttle bus; transported his half-brother, Herman Dennis,[12] and Sergeant Burns to the Jade Shop, where the latter struck and knocked Ruth Farnsworth to the floor (TR (B) 53–54, 55, 58, 59, 62, 73). Herman Dennis and Burns then threw the girl into the truck, and as Calvin drove the truck around to the clearing in the jungle in back of the Jade Shop, Herman and Burns took her off the truck into the jungle (TR (B) 54, 64, 65). Calvin then returned to his organization, where, shortly after 9 o'clock that evening, Burns called and asked Calvin to pick him up near a place called the Rocker Club (TR (B) 54–55, 141–142). Later, when Calvin was driving Burns back, the latter told him that he had intercourse with Ruth Farnsworth once or twice that night (TR (B) 55). When Calvin asked Burns why he struck the girl, Burns warned him to keep quiet lest he "get what she got" (*id.*). Burns then pulled out a smock, which he said he had taken from Miss Farnsworth, and placed it behind the seat of Calvin's truck (TR (B) 55–56).

[12] Calvin Dennis has supplied affidavits, attached to the habeas corpus petitions, stating that he is not a half-brother of Herman Dennis, and is not related to him, but at the Burns trial he testified that he was "supposed" to be Herman's half-brother (TR (B) 58; Resp. Ex. (Burns) G, p. 11, Appendix C, *infra*, p. 125) and Herman Dennis's confession referred to Calvin as his half-brother (Resp. Ex. (Dennis) C, p. 13, 4 CMR (AF) at 881).

There was further testimony to the effect that about 9:45 p. m., on December 11, 1948, a soldier noticed what appeared to be blood stains on Burns' trousers, and when he asked about them, Burns stated that he received the stains "cutting meat" (TR (B) 142–145).[13] Another soldier testified that the following morning Burns told him that he had intercourse but that he "got it the wrong way" (TR (B) 150).

Burns did not testify in his own behalf (TR (B) 159–160). His witnesses gave testimony tending to show that Calvin Dennis was intoxicated in the early evening of December 11th (TR (B) 154–159).

b. *Assistance of counsel.*—Burns was arrested by the naval military government police on January 10, 1949, and held by them until January 31, 1949, when he was transferred to the military authorities for confinement (TR (B) 181). On February 1, 1949, a charge and specifications similar to those preferred against Herman Dennis were filed against Burns (TR (B) 8–9). On March 31, three defense counsel were formally appointed for him (TR (B) 1). At the beginning of his trial on May 27, Burns introduced Captain Martin S. Drucker, a member of the Judge Advocate

[13] Although Burns was a mess sergeant, his duties did not include meat cutting; and it was improbable that any meat was cut on the night of December 11, 1948, which was Saturday, since Sunday dinners consisted of chicken or turkey, prepared from frozen fowl, which did not bleed much during the cutting process (TR (B) 150).

General's Corps of the Army and a qualified lawyer, as his "individual counsel," and made a request, which was granted, to retain two of the three regularly appointed defense counsel "to act as associate counsel" (TR (B) 3). Burns then stated that he was "satisfied" with such counsel, (*id.*). Neither he nor counsel of his choice requested a continuance of his trial (*id.*).

B. REVIEW BY THE STAFF JUDGE ADVOCATE AND THE BOARD OF REVIEW.

Pursuant to Article of War 47 (10 U. S. C., Supp. II, 1518 (c), *infra,* p. 83), the Staff Judge Advocate reviewed the record of the proceedings of both Herman Dennis and Burns, in separate written reports, and recommended approval of the sentences. See Resp. Ex. A in each proceeding. After approval by the convening authority, the respective trial records were forwarded to The Judge Advocate General of the Air Force, in Washington, D. C., for appellate review pursuant to Article of War 48 (10 U. S. C., Supp. II, 1519, *infra,* p. 83) (Resp. Exs. (Dennis) A, B, 4 CMR (AF), 872; Resp. Exs. (Burns) A, B, 4 CMR (AF) 907).

On November 21, 1949, a three-member Board of Review, in the office of The Judge Advocate General, after a review of Dennis' court martial proceedings and with the help of a brief and oral argument by one of his present counsel, found in a comprehensive opinion that "no errors injuriously affecting the substantial rights of the

accused were committed during the trial" and approved it (Resp. Ex. (Dennis) C, 4 CMR (AF), 872, 887).[14] After a similar submission of a brief and oral argument on behalf of Burns by one of his present counsel, a Board of Review, consisting of three different members, affirmed his court-martial proceedings on March 14, 1950, likewise in a comprehensive opinion (Resp. Ex. (Burns) C).[15]

1. As to Dennis, the Board of Review found as follows:

a. The record did not show that Herman Dennis, while in custody of the Guam authorities, suffered undue hardships or privations or that there was "any calculated endeavor on the part of officials to secure a confession through the pressure of unrelenting questioning" (Resp. Ex. (Dennis) C, p. 19; 4 CMR (AF) 872, 885). Although Herman Dennis together with other soldiers had voluntarily submitted to a "lie-detector" test prior to his arrest, no confessions

[14] The opinion of this Board of Review is reported at ACM 1892, Dennis (BR), 4 CMR (AF) 872–888. This citation refers to volume 4 of the Court Martial Reports of the Judge Advocate General of the Air Force, hereinafter referred to as CMR (AF). Volume 4 of CMR (AF) also reports the opinions of the Judicial Council in both cases (*infra*, pp. 21–22) and The Judge Advocate General's Memoranda to the Secretary of the Air Force (*infra*, pp. 22–23). Reprints of these opinions and memoranda, as reported in 4 CMR (AF), have been lodged with the Clerk.

[15] The opinion of this Board of Review is reported at 4 CMR (AF) 907–923.

were made while he was undergoing such tests, nor were the results of the tests used in evidence (*id.*).

b. The counsel requested by Herman Dennis (Lt. Col. Daly) was "not available" under Article of War 17 (10 U. S. C., 1946 ed. 1488). The "official files of the Air Force available at Headquarters, USAF", showed "that at the time of trial the officer requested by the accused as individual defense counsel was himself under charges involving misconduct, moral turpitude, drunkenness and disorderliness and the corrupt endeavor to obstruct and impede military justice *in the instant case and others allied therewith* and the unethical offer to abandon and withdraw from the defense of this accused and others provided he would be granted immunity from punishment for alleged prior acts of his own misconduct" (Resp. Ex. (Dennis) C, p. 17; 4 CMR (AF) 872, 884 (emphasis in original). On the date of the trial (May 9), Daly's resignation from the service "was in the processes of military administration," since on April 19, 1949, he had tendered such resignation "for the good of the service, in lieu of trial by court-martial" on the various charges pending against him (*id.*).

"The record of trial reveals that" Dennis "was defended ably and vigorously by the regularly appointed defense counsel, all three of whom were qualified attorneys, admitted to the practice of law in their respective states and designated as

judge advocates by the Chief of Staff, United States Air Force", and that they participated in the case since their formal assignment (March 21, 1949) without knowledge that Dennis was willing to obtain Coloney Daly as special counsel after the original information to Dennis that Daly was unavailable for the requested assignment (Resp. Ex. (Dennis) C, pp. 15–18; 4 CMR (AF) 872, 882–884).[16]

2. As to Burns, the Board of Review found that the record indicated that he "was defended at the trial by counsel of his choice" (Resp. Ex. (Burns) C, p. 19; 4 CMR (AF) 907, 921–922); that "Calvin Dennis' testimony was consistent in every respect with the corroborative evidence" (Resp. Ex. (Burns) C, p. 11; 4 CMR (AF) 907, 916); and that the atmosphere on Guam was not such as to preclude a fair and impartial trial (Resp. Ex. (Burns) C, p. 22; 4 CMR (AF) 907, 922).[17]

C. REVIEW BY THE JUDICIAL COUNCIL AND THE JUDGE ADVOCATE GENERAL

The Judicial Council, in the Office of The Judge Advocate General, after the submission of separate briefs and oral arguments on behalf of each petitioner by one of their present counsel to the

[16] The other alleged irregularities, now urged in the habeas corpus petitions, were apparently not urged by petitioner's counsel before the Boards of Review but were urged subsequently before The Judge Advocate General on petition for new trial (see pp. 23–28, *infra*).

[17] See fn. 16, *supra*.

effect "that the conviction should not be permitted to stand because the record shows violation of" their "fundamental individual rights," approved all prior proceedings against Dennis and Burns on July 18, and August 18, 1950, respectively (Resp. Ex. (Dennis) D; 4 CMR (AF) 888–904; Resp. Ex. (Burns) D; 4 CMR (AF) 923–927). The two opinions were extensive, considering each of the points raised by the accuseds' counsel.

Subsequently, in view of a series of letters on behalf of petitioners, containing "allegations which if true would reflect adversely upon the fundamental fairness of" their trials, and because of the gravity of the sentences, The Judge Advocate General of the Air Force, in his "capacity as supervisor of the administration of military justice generally," "requested the Office of Special Investigations, Office of The Inspector General, to make a complete investigation of these matters" (Resp. Ex. (Dennis) E; 4 CMR (AF) 904–907; Resp. Ex. (Burns) E; 4 CMR (AF) 927–930). Later, in transmitting, pursuant to the provisions of AW 50 (d) (1) (*infra*, pp. 84–85), the records of the appellate review accorded petitioners to the Secretary of the Air Force, The Judge Advocate General reported that "the most comprehensive investigation of the Office of Special Investigations disclosed nothing which would warrant my recommending disapproval of

the sentence" of either petitioner (Resp. Ex. (Dennis) E, p. 4; 4 CMR (AF) 904, 906; Resp. Ex. (Burns) E, p. 4; 4 CMR (AF) 927, 929).[18] On August 3, 1951, the President of the United States confirmed petitioners' sentences and ordered their execution by the Commanding General, Far East Air Force (Resp. Ex. (Dennis) F; 4 CMR (AF) 907; Resp. Ex. (Burns) F; 4 CMR (AF) 930).

D. REVIEW ON PETITIONS TO THE JUDGE ADVOCATE GENERAL FOR NEW TRIALS

Thereafter, petitioners, pursuant to provisions of 50 U. S. C., Supp. V, 660 (formerly Article of War 53), filed with The Judge Advocate General their petitions for a new trial (R. 8, 17, 19, 2, 10; Resp. Ex. (Dennis) G, p. 4; Resp. Ex. (Burns) G, p. 4). These petitions urged all the points which are set forth in the present habeas corpus petitions. The Judge Advocate General appointed a new board of officers, which heard the arguments of petitioners' counsel, and considered all the evidence presented (Resp. Ex. (Dennis) G, Appendix B, *infra,* pp. 88–108; Resp. Ex. (Burns) G, Appendix C, *infra,* pp. 109–130). On January 28, 1952, The Judge Advocate General, after considering the memoranda of the board of officers and after re-examining petition-

[18] The reports of the independent investigation were also forwarded to the Secretary of the Air Force (4 CMR (AF) 929).

ers' entire trial records and the independent investigations conducted at his request, as against the allegations set forth in their petitions for a new trial, denied petitioners' request for a new trial. He made the following findings with respect to the grounds alleged in their petitions:[19]

1. *Unlawful detention.*—He concurred in the findings of the Judicial Council that at the time of their arrest petitioners were "not deprived of any right to a preliminary hearing before a committing magistrate or other like authority", because Guam at that time was under control of "a military government deriving its authority from the United States and administered by the Department of the Navy. * * * Chapter 35, 'Civil Regulations With the Force and Effect of Law in Guam' (United States Government Printing Office, 1947) provides for the detention of United States military personnel and with respect to such personnel, operates in lieu of Sections 825 and 847–849, Penal Code of Guam, which is applicable to other offenders" (Resp. Ex. (Dennis) G, p. 7, Appendix B, *infra*, pp. 99–100). It was pointed out that this objection had no application to Burns since he had made no confession (Resp. Ex. (Burns) G, p. 7, Appendix C, *infra*, pp. 119–120).

[19] For the Court's convenience, the opinions of The Judge Advocate General on the petitions for new trial are reprinted in Appendix B (Dennis), and Appendix C (Burns), *infra*, pp. 88–130.

2. *Coerced confessions.*—The four statements made by Herman Dennis while he was detained by the Guam authorities were received in evidence against him, only "after presentation to the court of much evidence with respect to the voluntary nature of these confessions, including petitioner's own sworn testimony as a witness in his own behalf, and his denial that physical force was used against him", together with testimony showing that he had been warned of his constitutional rights (Resp. Ex. (Dennis) G, p. 8, Appendix B, *infra,* pp. 100–101). The Judge Advocate General agreed with the court that all the confessions were wholly voluntary (Resp. Ex. (Dennis) G, p. 8, Appendix B, *infra,* p. 101).

3. *Denial of counsel of petitioners' choice, or effective assistance of counsel.*—The record showed that petitioners had "capable counsel" of their own choice, and that they were defended with "loyalty, ability, and skill" (Resp. Ex. (Dennis) G, p. 12, Appendix B, *infra,* pp. 106–107; Resp. Ex. (Burns) G, p. 12, Appendix C, *infra,* p. 128).

4. *Suppression of evidence.*—The Judge Advocate General, in rejecting as a ground for a new trial the contention "that important evidence in the nature of Filipino identification discs (dog-tags) and a blood-stained Navy officer's uniform alleged to have been found in the vicinity of the crime about the time of its commission, was with-

held from the court," stated that "this allegation was made the subject of a thorough investigation, from which I have concluded that the charge is baseless" (Resp. Ex. (Dennis) G, p. 12, Appendix B, *infra,* p. 107; Resp. Ex. (Burns) G, p. 13, Appendix C, *infra,* p. 128).

5. *Perjured testimony.*—In view of the trial record and circumstances surrounding the case, The Judge Advocate General found that he could not place any credence in Calvin Dennis' affidavits repudiating his testimony given against Burns at the latter's trial (Resp. Ex. (Burns) G, p. 8, Appendix C, *infra,* pp. 120–125). He agreed with the Judicial Council, which found that "the record discloses that the trial judge advocate and the law member used commendable care to assure that Private Calvin Dennis appeared as a witness voluntarily and that there was present no coercive influence which would cause him to tell other than the truth", and that their interrogation shows "conclusively that Private Calvin Dennis offered himself as a witness freely and voluntarily and that his testimony was given with a full and complete understanding of his rights, uninfluenced and uncolored by any threat or promise" (Resp. Ex. (Burns) D, p. 5, 4 CMR (AF) 907, 926; Resp. Ex. (Burns) G, p. 10, Appendix C, *infra,* pp. 123–124). During his repeated assertions that he was testifying voluntarily, Calvin Dennis "sustained himself through a searching

cross-examination" by the defense. (Resp. Ex. (Burns) G, p. 8, Appendix C, *infra,* p. 122).

Concerning the affidavits of Lieutenant Colonel Daly and Miss Mary Louise Hill, in which they alleged facts tending to support the theory of the involuntary nature of Calvin Dennis' confessions, The Judge Advocate General noted that the allegations contained therein "were made the subject of an exhaustive investigation by the Directorate of Special Investigations, Office of the Inspector General, United States Air Force, both from the standpoint of the charges made and the motives for making the charges", and after reviewing the results of this investigation he could "arrive at no different conclusion than that previously reached, that the charges are unfounded". (Resp. Ex. (Dennis) G, p. 9, Appendix B, *infra,* p. 102; Resp. Ex. (Burns) G, pp. 10–11, Appendix C, *infra,* p. 125).

6. *Trial in an atmosphere of terror.*—The Judge Advocate General approved the conclusions (Resp. Ex. (Burns) G, pp. 13–14, Appendix C, *infra,* p. 120) that Burns' record shows that the atmosphere on Guam was not such as to preclude a fair and impartial trial (Resp. Ex. (Burns) C, p. 22; 4 CMR (AF) 907, 922). "All members of the court were from organizations located at distant points from the Island of Guam" (*id.*). Burns' counsel cross-examined several of the members of the court to determine whether they

possessed any preconceived opinion as to Burns' guilt or innocence, and declined to challenge any member for cause (*id.*). As for Dennis' charge that he was prejudiced by the admission of testimony by a white woman on Guam that petitioner had stated to her his unhappiness at segregation on the island and his desire for her picture, The Judge Advocate General concluded that the "evidence was properly admitted as a circumstance tending to show petitioner's feeling toward women, and his previous desires for female companionship", and that the evidence was not introduced to prejudice the court-martial (Resp. Ex. (Dennis), G. p. 10, Appendix B, *infra*, p. 104).

III

THE JUDICIAL PROCEEDINGS

The District Court, without affording petitioners a hearing, dismissed the petitions for writs of habeas corpus, on the ground that they did "not state facts upon which the relief sought can be granted" (R. 20). On the basis of the materials summarized in Part II (*supra*, pp. 6–28), it ruled that "The record here shows that extensive consideration was given to each of the matters asserted in support of the relief sought in these proceedings, and the various military authorities who were charged with the responsibility of review determined such matters to be factually groundless" (R. 19–20).

On appeal, the Court of Appeals for the District of Columbia Circuit affirmed the judgments of the District Court (R. 57–58). It stated that, in accordance with its "frequent practice in capital cases," it had examined "the whole" of petitioners' "long records," but concluded, "in agreement with the District Court, that the facts alleged in the petitions, viewed in the light of the return to the rule, do not supply grounds upon which the relief sought can be granted" (R. 43). The court's exhaustive opinion took up each of the allegations of irregularity or unfairness, including the affidavits presented in support of the charges, and concluded that none of the allegations went to the jurisdiction of the court-martial, even under an expanded concept of jurisdiction. Circuit Judge Bazelon dissented on the ground that a sufficient showing had been made by petitioners to call for a hearing in the District Court (R. 44–56).

SUMMARY OF ARGUMENT

I

A. Throughout the history of the United States, this Court has consistently and repeatedly held that the only function of the civil courts in reviewing a trial by court-martial is to determine whether the court-martial was acting within its jurisdiction. Decisions have limited collateral inquiry to whether the court-martial had been

properly constituted, had jurisdiction of the person and offense or subject matter, and had power to impose the sentence. See, *e. g., Ex parte Reed,* 100 U. S. 13, 23. Under this concept, this Court has held insufficient to raise a jurisdictional issue allegations that one officer acted as accuser, prosecution witness, and member of the court (*Keyes* v. *United States*, 109 U. S. 336, 340); that a member of the court was biased against an accused (*Swaim* v. *United States*, 165 U. S. 553, 560–1); and that a confession was obtained by duress (*Collins* v. *McDonald*, 258 U. S. 416, 420–421).

The recent tendency by lower courts to expand the concept of jurisdiction has not been reflected in the recent decisions of this Court. In *Humphrey* v. *Smith*, 336 U. S. 695, this Court held, contrary to the trend in the lower courts, that failure to comply with the pre-trial investigation procedure of former Article of War 70 did not oust a court-martial of jurisdiction. And *Hiatt* v. *Brown*, 339 U. S. 103, went squarely counter to the tendency indirectly to review court-martial proceedings on the ground that a totality of errors would establish such lack of due process as to deprive the court-martial of jurisdiction.

There is in the subsequent decision of this Court in *Whelchel* v. *McDonald*, 340 U. S. 122, 124, a suggestion that denial of a truly basic right—specifically the opportunity to

raise before the military authorities a fundamental issue which should be considered by them—could amount to a jurisdictional defect. We may assume for this case that a jurisdictional issue would also be raised if there was in the military proceeding a defect so serious as to deprive it of the essential characteristics of a trial, as, for example, if there was a finding without hearing any evidence. But a jurisdictional issue is not presented merely by challenging as unfair or incorrect the manner in which a duly constituted court-martial (or reviewing authority) has determined an issue within its jurisdiction, or by claiming that the point of time at which, or the manner in which, the issue may be raised within the military proceedings amounts in effect to a denial of a fair opportunity to present the issue.

B. The reasons for the consistent position of this Court that review of courts-martial is strictly limited to fundamental matters of jurisdiction stem from the different natures and goals of military and civil life. The maintenance of discipline, and the concomitant necessity of punishing offenders, form an important and integral part of the military establishment whose primary function is to defend the country, and, in time of war, to win the war. The problem of balancing the needs of the defense forces against the traditional rights of an individual accused is es-

sentially a question for legislative judgment, and was recognized as such by the framers of the Constitution. The military courts are created by Congress under the authority conferred by the First Article of the Constitution; they are not courts with jurisdiction in law and equity within the meaning of the Third Article. *In re Vidal*, 179 U. S. 126. It is part of our constitutional pattern that "to those in the military or naval services of the United States, the military law is due process." *Reaves* v. *Ainsworth*, 219 U. S. 296, 304.

There are also practical reasons why review by civil courts should be strictly limited. The persons who participated in any particular court-martial may, by the time the matter comes up in civil courts, be stationed in distant places in performance of their primary duty to defend the country. The burden of collateral inquiry into their past actions should not lightly be imposed.

The limited function of the civil courts with respect to courts-martial is emphasized by the fact that Congress has shown itself to be well aware of its obligation to protect the fundamental rights of individuals subject to military law. The revisions of the Articles of War spell out the individual rights of the accused and provide complete and dispassionate review separate from the immediate command under which the court-martial is conducted. The military establish-

ment itself affords adequate machinery for an impartial trial and for the correction of trial error or unfairness.

C. When petitioners' general characterizations of a denial of fundamental rights to a trial are examined in the light of the facts alleged in support thereof, as well as of the record within the system of military justice, it is evident that petitioners are in actuality seeking review of military determinations with which they disagree, rather than attacking jurisdiction.

1. The admissibility of the Herman Dennis confessions was litigated at every step of the military process. Petitioner's attack on the holding of admissibility seeks merely a re-evaluation of the evidence pertaining to duress, a right he does not have. *Whelchel* v. *McDonald*, 340 U. S. 122, 124, 126. Such a contention would not support a collateral attack on a criminal judgment of conviction.

2. Insofar as the argument as to illegal detention is separate from that on the admissibility of the confessions, it clearly raises no issue of jurisdiction. Aside from the fact that the matter was presented to and decided by the military authorities, the rule of *McNabb* v. *United States*, 318 U. S. 332, is not imposed by the Due Process Clause and does not apply to courts-martial.

3. Although petitioners allege denial of effective assistance of counsel, it is indisputable that

(a) they did in fact have counsel who had ample time to prepare for trial and (b) that this issue was also presented to and determined by the military in the course of appellate review. Dennis is really seeking review of the careful decision of the military authorities as to the availability of Lt. Col. Daly, and Burns a review of the conduct of his own personally selected counsel.

4. The charge that the trials were conducted in an atmosphere of terror is unsupported by allegations of fact except a rumor that there would be a riot. That is not a sufficient allegation of fact for this serious charge, particularly where it appears on the face of the record that all members of the court were summoned from distant stations to conduct a trial at a place which was wholly under military control.

5. In the abstract, a charge of the knowing use of perjured testimony and knowing suppression of evidence may present a question so fundamental to the concept of a trial as to raise an issue of jurisdiction, if review by civil courts extends at all beyond the traditional limitations of jurisdiction. However, petitioners, in support of their charge, have filed affidavits which seem to indicate that the alleged facts were known to the affiants and to petitioners before trial. They have not made clear their ignorance nor alleged the fraud in sufficient detail to warrant the District Court in holding a hearing. Rather, they have

rested on wholesale and obscure charges, largely based on hearsay, which they have not connected with the prosecution or the actual trial in any substantial way. Moreover, the allegations were reviewed during the course of military review and were rejected after exhaustive and independent investigation. Petitioners are, therefore, simply asking civil courts to review a matter which was properly before and properly passed upon by the military authorities.

As to the allegation that the testimony of Calvin Dennis was perjured, the record of the Burns trial clearly shows that the credibility of Calvin Dennis was attacked on the ground that he had been offered inducements to testify. This allegation of the knowing use of perjured testimony is merely, once again, an indirect way of attempting to secure a redetermination of a dispute in issue at the trial.

II

Even assuming that the allegations of the knowing suppression of relevant evidence and use of perjured testimony were sufficient, and that, under a broader concept of jurisdiction, some of the other allegations could be deemed to raise jurisdictional issues, the court below was clearly correct in holding that no hearing was required, since the District Court could, on examination of the record, properly adopt the findings made

by the military in the course of the corrective process available within the system of military justice.

In view of the constitutional and historical separation of military and civil courts, the court below was justified in applying to habeas corpus review of court-martial judgments the general principles governing the reviewability, in federal habeas corpus, of state court judgments. See *Gusik* v. *Schilder*, 340 U. S. 128, 131–132.

A. It is well-established that, where the constitutional questions raised by a person convicted in a state court have been adjudicated on the merits in the state corrective proceedings, a federal court will not re-examine the questions thus adjudicated unless the state system was unable to afford a constitutionally adequate process for relief, or some "exceptional circumstances of peculiar urgency are shown to exist." *E. g., Ex parte Hawk*, 321 U. S. 114, 117, 118.

Petitioners were given full opportunity to, and did, tender before the military appellate authorities, and in the proceedings for a new trial, exactly the same issues raised in their habeas corpus petitions. The appellate and corrective processes within the Air Force and the executive branch were plainly adequate in structure and powers. In particular, under the new trial procedure of former Article of War 53 (10 U. S. C. (Supp. II) 1525), and its successors in the Uniform

Code of Military Justice, Congress made broad provision for post-conviction hearings and redress of wrongs. Such procedure is fundamentally fair. The fact that it may not in all respects accord with that in civil cases is not a valid objection. Cf. *United States* v. *Fletcher*, 148 U. S. 84. The record shows that each of petitioners' contentions was carefully considered, even to the point of a special independent investigation of the allegations relating to matters outside the record, and the results of the investigation were re-examined by a special board of officers after hearing petitioners' counsel in support of the motions for a new trial, as well as by The Judge Advocate General. Hence the habeas corpus court properly could and should, in the exercise of its discretion based on the military record before it, adopt the military findings without an additional hearing. *Darr* v. *Burford*, 339 U. S. 200.

B. Moreover, the Court of Appeals did not content itself with summarily accepting the military findings, but made a careful review of the materials pertaining to each of petitioners' charges. This review reinforces the correctness of its conclusion that the process of military review had fairly determined the issues against petitioners.

ARGUMENT

I

THE PETITIONS FOR HABEAS CORPUS, WHEN CONSIDERED WITH BOTH THE FACTS ALLEGED IN SUPPORT AND THE MILITARY RECORD, RAISE NO ISSUE OF JURISDICTION, WHICH ALONE IS WITHIN THE COMPETENCE OF CIVIL COURTS TO REVIEW

A. REVIEW OF COURTS-MARTIAL BY CIVIL COURTS IS STRICTLY LIMITED TO ISSUES OF JURISDICTION

Throughout the history of the United States, this Court has consistently and repeatedly held that it is not the function of the civil courts to review trials by court-martial except to determine whether the court-martial was acting within its jurisdiction. The scope of civil review was succinctly expressed in the case of *In re Grimley*, 137 U. S. 147, 150, as follows:

> It cannot be doubted that the civil courts may in any case inquire into the jurisdiction of a court-martial, and if it appears that the party condemned was not amenable to its jurisdiction, may discharge him from the sentence. And, on the other hand, it is equally clear that by *habeas corpus* the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial; and that no mere errors in their proceedings are open to consideration. The single inquiry, the test, is jurisdiction.

This concept of the separateness of courts-martial and their immunity from civil review except

on jurisdictional grounds was suggested in the early opinions of Chief Justice Marshall in *Wise* v. *Withers,* 3 Cranch 331, and *Ex Parte Watkins,* 3 Pet. 193. See also *Martin* v. *Mott,* 12 Wheat. 19, 38–39. It was explicitly articulated in *Dynes* v. *Hoover,* 20 How. 65, 82–83. Succeeding decisions have limited collateral inquiry to whether the court-martial had been properly constituted, had jurisdiction of the person and offense or subject matter, and had power to impose the sentence. *Ex Parte Reed,* 100 U. S. 13, 23; *Ex Parte Mason,* 105 U. S. 696, 699; *Keyes* v. *United States,* 109 U. S. 336, 340; *Wales* v. *Whitney,* 114 U. S. 564, 570; *Kurtz* v. *Moffitt,* 115 U. S. 487, 500; *Smith* v. *Whitney,* 116 U. S. 167, 177–179, 186; *Runkle* v. *United States,* 122 U. S. 543, 556; *In re Grimley,* 137 U. S. 147, 150; *Mullan* v. *United States,* 140 U. S. 240, 245; *United States* v. *Fletcher,* 148 U. S. 84, 91–92; *Johnson* v. *Sayre,* 158 U. S. 109, 118; *Swaim* v. *United States,* 165 U. S. 553, 555, 561, 562, 565, 566; *Carter* v. *Roberts,* 177 U. S. 496, 498; *Carter* v. *McClaughry,* 183 U. S. 365, 380–381, 382–401; *McClaughry* v. *Deming,* 186 U. S. 49, 63, 69; *Bishop* v. *United States,* 197 U. S. 334; *Grafton* v. *United States,* 206 U. S. 333, 345–348; *Mullan* v. *United States,* 212 U. S. 516, 520; *Givens* v. *Zerbst,* 255 U. S. 11, 19; *Collins* v. *McDonald,* 258 U. S. 416, 418, 420–421; *French* v. *Weeks,* 259 U. S. 326, 335–336 (military boards and courts of inquiry); *Gregory* v. *Weeks,* 259

U. S. 336, 343–344 (the same); *Ex Parte Quirin,* 317 U. S. 1 (military commission); *In re Yamashita,* 327 U. S. 1, 8–9 (military commission); *Humphrey* v. *Smith,* 336 U. S. 695, 696; *Wade* v. *Hunter,* 336 U. S. 684, 688; *Hiatt* v. *Brown,* 339 U. S. 103, 110–111; *Whelchel* v. *McDonald,* 340 U. S. 122, 124; *Gusik* v. *Schilder,* 340 U. S. 128, 132–133.

Errors, improprieties, and irregularities not going to jurisdiction have not been enough to invoke civil review, and the civil courts cannot review and weigh evidence, pass on evidentiary or procedural rulings, or determine the guilt or innocence of the accused. The extent to which the concept of "jurisdiction" has been limited in the past is well illustrated by *Keyes* v. *United States,* 109 U. S. 336, where the Court declared itself without power to set aside a court-martial conviction in which one officer acted as accuser, prosecution witness, and a member of the court, although the Court took pains to point out that it was expressing "no opinion as to the propriety of the proceedings of the court-martial in the respects in which they are assailed" (109 U. S. at 340). In *Swaim* v. *United States,* 165 U. S. 553, 560–561, the civil courts refused to review, as beyond their competence, the action of a court-martial in permitting an officer to sit as a member whom the accused had several times severely criticized and who, it was charged, was therefore an enemy of the accused. And in *Collins* v. *Mc-*

Donald, 258 U. S. 416, 420–421, the Court declared that admission of a confession allegedly procured by the accused's superior officer by the exercise of duress was "an error in the admission of testimony, which cannot be reviewed in a *habeas corpus* proceeding." See also, *e.g., Carter* v. *Woodring,* 92 F. 2d 544, 546 (C. A. D. C.), certiorari denied, 302 U. S. 752 (alleged subornation of perjury by trial judge advocate, prior agreement of members of court to convict accused, instructions by superior to court members to convict, etc.); *Ex Parte Tucker,* 212 Fed. 569 (D. Mass.) (violation of statutory prohibition forbidding judge advocate to be present during closed session of court-martial).

It was not until recently, starting about 1943 with the case of *Schita* v. *King,* 133 F. 2d 283 (C. A. 8), certiorari denied, 322 U. S. 761 (cf. *Schita* v. *Cox,* 139 F. 2d 971 (C. A. 8), certiorari denied, 322 U. S. 761), that there began to appear, in the lower federal courts, a tendency to broaden the concept of jurisdiction beyond the traditional limitations established by the earlier decisions. See Pasley, *The Federal Courts Look at the Court-Martial* (1950) 12 Univ. of Ptt. L. Rev. 7, 25–34. That tendency has not been reflected in the recent decisions of this Court.

Thus, one of the major bases for attack on courts-martial in recent cases was the claim that failure strictly to comply with the pre-trial investigation procedure of former Article of War

70 (10 U. S. C., 1946 ed., 1542) resulted in ousting the court-martial of jurisdiction. See, *e. g.*, *Henry* v. *Hodges*, 171 F. 2d 401 (C. A. 2), certiorari denied *sub nom. Henry* v. *Smith*, 336 U. S. 968; *Reilly* v. *Pescor*, 156 F. 2d 632, 634–635 (C. A. 8), certiorari denied, 329 U. S. 790; *De War* v. *Hunter*, 170 F. 2d 993, 995–997 (C. A. 10), certiorari denied, 337 U. S. 908; *Benjamin* v. *Hunter*, 169 F. 2d 512 (C. A. 10); and see Note, *The Preliminary Investigation in the Army Court-Martial System—Springboard for Attack by Habeas Corpus* (1949), 18 Geo. Wash. L. Rev., 67 ff. When that issue came before this Court, it held that the requirements of Article of War 70 were not mandatory and that failure to comply therewith was not jurisdictional. *Humphrey* v. *Smith*, 336 U. S. 695.[29] And in *Wade* v. *Hunter*, 336 U. S. 684, 688 (fn. 4), the Court expressly passed over the issue of the extent to which a court-martial's overruling of a plea of former jeopardy under the Fifth Amendment is subject to collateral attack in habeas corpus.

Even more important is the fact that this Court, in *Hiatt* v. *Brown*, 339 U. S. 103, went squarely counter to the tendency which had developed in the lower federal courts indirectly to review court-martial proceedings on the ground that a totality

[29] It is to be noted that many of the cases on due process cited in footnote 28 of the Court of Appeals' opinion below (R. 30) revolved around Article of War 70.

of errors would establish such lack of due process as to deprive the court-martial of jurisdiction. See, *e. g.*, *Schita* v. *King*, 133 F. 2d 283 (C. A. 8), certiorari denied, 322 U. S. 761; *United States* v. *Hiatt*, 141 F. 2d 664, 666 (C. A. 3); *Waite* v. *Overlade*, 164 F. 2d 722, 724 (C. A. 7), certiorari denied, 334 U. S. 812; *United States ex rel Weintraub* v. *Swenson*, 165 F. 2d 756 (C. A. 2); *De Wair* v. *Hunter*, 170 F. 2d 993, 996–997 (C. A. 10), certiorari denied, 337 U. S. 908; *Montalvo* v. *Hiatt*, 174 F. 2d 645 (C. A. 5), certiorari denied, 338 U. S. 874; *Hicks* v. *Hiatt*, 64 F. Supp. 238, 249–250 (M. D. Pa); *Anthony* v. *Hunter*, 71 F. Supp. 823 (D. Kan.); *Boone* v. *Nelson*, 72 F. Supp. 807, 808 (D. Me.). In the light of this trend of lower court decisions, it is significant that this Court reversed such a "due process" holding and expressly reaffirmed the traditional scope of civil review of courts-martial, stating (*Hiatt* v. *Brown*, 339 U. S. 103, 110–111):

> The Court of Appeals also concluded that certain errors committed by the military tribunal and reviewing authorities had deprived respondent of due process. We think the court was in error in extending its review, for the purpose of determining compliance with the due process clause, to such matters as the propositions of law set forth in the staff judge advocate's report, the sufficiency of the evidence to sustain respondent's conviction, the adequacy of the pretrial investigation, and the com-

petence of the law member and defense counsel. Cf. *Humphrey* v. *Smith*, 336 U. S. 695 (1949). It is well settled that "by *habeas corpus* the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial * * * The single inquiry, the test, is jurisdiction." *In re Grimley*, 137 U. S. 147, 150 (1890). In this case the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision. *In re Yamashita*, 327 U. S. 1, 8–9 (1946); *Swaim* v. *United States*, *supra*, 165 U. S. at 562.

The Court of Appeals below attached considerable significance to the use of the phrase "acted within its lawful powers" in the *Hiatt* v. *Brown* opinion, *supra*, and construed that expression as implying a broader scope of review than has been traditional. Such an interpretation of the opinion is not well founded. The quoted expression is not new; it has been employed repeatedly over a period of years to epitomize the jurisdictional requirement that the sentence imposed by a court-martial be within the maximum limit prescribed for the offense. Thus, in 1895, in *Johnson* v. *Sayre*, 158 U. S. 109, 118, the Court held:

> The court martial having jurisdiction of the person accused and of the offense charged, and having acted within the scope of its lawful powers, its decision and sentence cannot be reviewed or set aside by the civil courts, by writ of *habeas corpus* or otherwise.

See, to the same effect, *Swaim* v. *United States,* 165 U. S. 553, 561 (1897). In 1902, in *Carter* v. *McClaughry,* 183 U. S. 365, 380–381, the Court quoted from *Carter* v. *Roberts,* 177 U. S. 496, as follows:

> * * * Courts martial are lawful tribunals, with authority to finally determine any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced.

In 1922, in *Collins* v. *McDonald,* 258 U. S. 416, 418, the Court said:

> If the District Court had issued the writ as prayed for, the only questions it would have been competent for it to hear and determine would have been, "Did the court martial which tried and condemned the prisoner have jurisdiction, of his person, and of the offense charged, and was the sentence imposed within the scope of its

lawful powers?" "The single inquiry, the test, is jurisdiction . . ."[21]

In the light both of these previous decisions in which similar language was employed and of the *Brown* holding itself, it seems clear to us that the use of the expression, "acted within its lawful powers," in *Hiatt* v. *Brown*, denoted no change in the matters of court-martial "jurisdiction" subject to review in habeas corpus. Certainly, giving it the reading most favorable to petitioners, *Hiatt* v. *Brown* holds (at least) that an allegation of lack of due process, supported merely by claimed errors as to matters which were in issue at the court-martial or in the course of military review, is not sufficient to raise an issue of jurisdiction. It is revealing that Circuit Judge Biggs, who before the *Brown* decision had, in *Hicks* v. *Hiatt*, 64 F. Supp. 238 (M. D. Pa.), given a sweeping interpretation to the concept of jurisdiction as embracing a claim of unfairness, has construed the *Brown* decision as leaving the district courts "no area of supervision or correction" beyond the historical concept of jurisdiction.

[21] In *Dynes* v. *Hoover*, 20 How. 65, 80, 81, 82, the Court spoke, by way of dictum, of deviations from certain essential rules in a court-martial proceeding as rendering the court-martial *coram non judice*. See also *Runkle* v. *United States*, 122 U. S. 543, 556 ("that all the statutory regulations governing its proceedings had been complied with"). The *Runkle* decision is criticized and limited in *United States* v. *Fletcher*, 148 U. S. 84, 90, and *Bishop* v. *United States*, 197 U. S. 334, 342.

United States ex rel. McClellan v. *Humphrey*, 181 F. 2d 757, 759 (C. A. 3).

There is in the subsequent decision of this Court in *Whelchel* v. *McDonald*, 340 U. S. 122, an obiter suggestion that denial within the court-martial system of a truly fundamental right may amount to a jurisdictional defect. That opinion states (at p. 124):

> We put to one side the due process issue which respondent presses, for we think it plain from the law governing court-martial procedure that there must be afforded a defendant at some point of time an opportunity to tender the issue of insanity. It is only a denial of that opportunity which goes to the question of jurisdiction.

But the opinion itself indicates that any claim of lack of due process must relate to a matter which is truly and basically jurisdictional, for the Court went on to say (at p. 126):

> Any error by the military in evaluating the evidence on the question of insanity would not go to *jurisdiction, the only issue before the court in habeas corpus proceedings.* [Italics supplied.]

And in *Gusik* v. *Schilder*, 340 U. S. 128, decided the same day, this Court referred to *In re Grimley*, 137 U. S. 147, 150 (*supra*, p. 38), for the proposition that the civil courts have traditionally exercised no power of supervision or review over courts-martial, and stated (at page 132):

> . . . These [military] tribunals have operated in a self-sufficient system, save only as habeas corpus was available to test their jurisdiction in specific cases.

See also 340 U. S. at 133, stressing jurisdiction as the only issue open in habeas corpus.

The Court has thus made it clear, recently as well as in past decisions, that it is not the function of the civil courts to re-evaluate matters determined in the military proceedings. Even the suggestion in the *Whelchel* opinion implies no more than that a jurisdictional question may be presented if opportunity is denied to raise before the military authorities a fundamental issue which should be considered by them. Though some earlier decisions look the other way (*supra*, pp. 39–40; see, especially, *Keyes* v. *United States*, 109 U. S. 336, and *Carter* v. *Woodring*, 92 F. 2d 544 (C. A. D. C.), certiorari denied, 302 U. S. 752), we may also assume for this case that a jurisdictional issue would be raised if there was in the military proceeding a defect so serious as to deprive it of the essential characteristics of a trial, as, for example, if there was a finding by the court-martial without hearing any evidence.[21a]

[21a] In *Dynes* v. *Hoover*, 20 How. 65, 82, the Court, in speaking of void court-martial proceedings, said that it did "not mean mere irregularity in practice on the trial, or any mistaken rulings in respect to evidence or law, but [of] a disregard of the essentials required by the statute under which the court has been convened to try and to punish an offender for an imputed violation of the law." Cf. *Mullan* v. *United States*, 212 U. S. 561, 570.

But a jurisdictional issue is not presented merely by challenging as unfair or incorrect the manner in which a duly constituted court-martial (or a reviewing authority) has determined an issue within its jurisdiction, or by claiming that the point of time at which, or the manner in which, the issue may be raised within the military proceedings amounts in effect to a denial of a fair opportunity to present the issue. The Court of Appeals below, in assuming that it had authority to review the military proceedings on a broad base to determine whether in their totality they accorded with due process, assumed a power which this Court has held to be beyond the competence of civil courts and thus accorded to petitioners a greater right of review than was their due.

B. UNDER THE CONSTITUTION, THE REGULATION OF COURTS-MARTIAL IS A MATTER FOR CONGRESS AND NOT FOR THE COURTS

This Court has seldom articulated the reasons why it has so consistently maintained the position that review of courts-martial by civil courts is to be strictly limited to fundamental matters of jurisdiction, but it is evident that they stem from the different natures and goals of military and civil life. The maintenance of discipline, and the concomitant necessity of punishing offenders, form an important and integral part of the military establishment whose primary function is to defend the country, and in time of war, to win the

war. The problem of balancing the needs of the defense forces against the traditional rights of an individual accused is essentially a question for legislative judgment, and was recognized as such by the framers of the Constitution. The military courts are created by Congress under the authority conferred by the First Article of the Constitution "To make Rules for the Government and Regulation of the land and naval Forces"; they are not courts "with jurisdiction in law or equity" within the meaning of the Third Article of the Constitution. *In re Vidal*, 179 U. S. 126; *Ex parte Vallandigham*, 1 Wall. 243; *Ex parte Quirin*, 317 U. S. 1, 39. Thus, it is part of our constitutional pattern that for those in the armed services it is for Congress to determine, in large part, what is the proper process, and that "to those in the military or naval services of the United States the military law is due process." *Reaves* v. *Ainsworth*, 219 U. S. 296, 304; *French* v. *Weeks*, 259 U. S. 326, 335; *Creary* v. *Weeks*, 259 U. S. 336, 344.[32] It has always been recog-

[32] See also *Ex parte Milligan*, 4 Wall. 2, 123, where this Court said:

"The discipline necessary to the efficiency of the army and navy, require other and swifter modes of trial than are furnished by the common law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offences committed while the party is in the military or naval service."

nized that a matter relating to the organization and administration of courts-martial is "a matter appropriate for congressional action." *Whelchel* v. *McDonald,* 340 U. S. 122, 127. The problem of applying to courts-martial the principles of basic fairness which would constitute due process in a military trial is likewise for Congress, and the execution of the congressional decision is primarily for the executive. The function of the judiciary is to see that the courts-martial act within the area in which they are confined by Congress.

Moreover, there are practical reasons why review by civil courts should be strictly limited. If review by habeas corpus should be widely allowed on grounds which raise issues of fact rather than of law, the necessity for a hearing could cause disruption to the military establishment. The extent of habeas corpus attacks on federal criminal convictions proved sufficiently burdensome to give rise to the new procedure embodied in 28 U. S. C. 2255. Permitting wide review of trials conducted by persons whose primary duty is, not judging, but defending our nation, is bound to be much more disruptive. That is particularly true today in view of the far-flung nature of our military forces. The persons who participated in any particular court-martial may, by the time the matter comes up in civil courts, be stationed in such distant

places as Guam or Korea or Europe. The necessity of obtaining their testimony, even by deposition, can be a real burden, and if civil hearings are to become common the burden will be multiplied many-fold. It is also, we believe, appropriate to recall that judicial unfamiliarity with military life, military law, and the processes of military justice can easily lead to erroneous evaluations of military conduct leading to unnecessary but far-reaching intervention in military affairs. See *Carter* v. *McLaughry*, 183 U. S. 365, 400–401; *Swaim* v. *United States*, 165 U. S. 553, 561–562; *Smith* v. *Whitney*, 116 U. S. 167, 178–179; *Dynes* v. *Hoover*, 20 How. 65, 82.

The limited function of the civil courts with respect to courts-martial is emphasized by the fact that Congress has shown itself to be well aware of the obligation imposed upon it by the Constitution to protect the fundamental rights of the individuals subject to military law. The Articles of War spell out the individual rights of the accused and provide a complete and dispassionate review separate from the immediate command under which the court-martial is conducted. The military establishment itself affords adequate machinery for the impartial trial of offenses and for the correc-

tion of trial error or unfairness. The rights which the serviceman may have under the Fifth Amendment (cf. *Johnson* v. *Eisentrager*, 339 U. S. 763, 783; *Ex parte Quirin*, 317 U. S. 1, 45; *Ex parte Milligan*, 4 Wall 2, 138 (opinion of Chase, C. J.)) and other constitutional provisions, or under the statutory rules governing military tribunals, can be, and are being, protected within the military justice system.

After World War I, Congress enacted a revision of the Articles of War (41 Stat. 759, 787), the basic purpose of which was to emphasize the justice aspects of military trials. See Ansell, *Some Reforms in Our System of Military Justice* (1922), 32 Yale Law Journal 146; Morgan, *The Existing Court-Martial System and the Ansell Army Articles* (1919), 29 Yale L. J. 52; Rigby, *Military Penal Law: A Brief Survey of the 1920 Revision of the Articles of War* (1921), 12 Am. J. Crim. L. *and Criminology* 84. It provided many protections, such as the requirement of preliminary investigation in former Article of War 70 (10 U. S. C., 1946 ed., 1542); the right to counsel in former Articles of War 11 and 17 (10 U. S. C., 1946 ed., 1482 and 1488); the prohibition against reconsideration of an acquittal or increase of sentence on review, in former Article of War 40 (10 U. S. C., 1946 ed., 1511). Former Article of

War 50½ (10 U. S. C., 1946 ed., 1522) established the system of appellate review by the Boards of Review with provision for a new trial in proper cases.

This system, after World War II, was the subject of a number of studies and investigations. See, *e. g.*, Holtzoff, *Administration of Justice in the United States Army* (1947), 22 N. Y. U. L. Q. Rev. 1, for a summary of the findings of the War Department's Advisory Committee on Military Justice. A Congressional subcommittee of the 79th Congress devoted more than a year to a detailed study of the Army system of justice (H. Rep. No. 2722, 79th Cong., 2d sess.).

The result was the revision of the Articles of War, 62 Stat. 627 (See H. Rep. 1034, 80th Cong. 1st Sess.) which, as implemented by the 1949 Manual for Courts Martial, United States Air Force (promulgated under Executive Order No. 10026, effective February 1, 1949), governed the proceedings against these petitioners. The amended Articles permitted enlisted personnel to serve on courts-martial on request of enlisted accused (Article of War 4, 10 U. S. C. (Supp. II) 1475); required the law member to be a lawyer (Article of War 8, 10 U. S. C. (Supp. II) 1479); provided that, if available, the trial judge advocate and defense counsel of general courts-

martial be lawyers (Article of War 11, 10 U. S. C. (Supp II) 1482). To meet the criticism of command influence, Article of War 88 (10 U. S. C. (Supp. II) 1560) provided that no convening authority or other commanding officer "may censure, reprimand or admonish" the court-martial or any member thereof "with respect to the findings or sentence adjudged by the court, or with respect to any other exercise * * * of its or his judicial responsibility." As to appellate review, the amended Articles of War created, in addition to the Board of Review set up by the 1920 revision, an additional appellate agency, known as the Judicial Council, composed of three general officers of the Judge Advocate General's Department; the revision granted both reviewing agencies, and The Judge Advocate General as well, "authority to weigh evidence, judge the credibility of witnesses, and determine controverted questions of fact" (Article of War 50, 10 U. S. C. (Supp. II) 1521). The amended Articles also contained the special legislation which was before this Court in *Gusik* v. *Schilder,* 340 U. S. 128, providing the right to petition for a new trial on broad grounds and establishing within the military establishment an additional corrective process. See Wallstein, *The Revision of*

the Army Court-Martial System (1948) 47 Col. L. Rev. 219.[23]

It is thus evident that Congress has not been unmindful of its constitutional duty to provide a comprehensive system of military justice. There is no basis in law or necessity for permitting or requiring civil courts to give a broad and general review of court-martial proceedings under the guise of determining whether due process has been accorded. Congress has assured due process to those in the military (cf. *Reaves* v. *Ainsworth,* 219 U. S. 296) and has given them the opportunity to bring before properly constituted military authorities all matters pertaining to their guilt or innocence, including the automatic right of review. Petitioners have been accorded all the rights granted to them under this system established by Congress, and

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[23] In 1950, following the unification of the armed services, 64 Stat. 495, Congress enacted the Uniform Code of Military Justice; 64 Stat. 107, which applied to the Navy and the Coast Guard the same procedure governing the Army and the Air Force, with some new provisions: *e. g.*, a provision making mandatory the practice which prevailed under the 1948 Articles of having legally trained counsel for both prosecution and defense at general courts-martial (Art. 27, 50 U. S. C. (Supp. V) 591); and a provision removing the law officer (formerly the law member) from membership on the court (Art. 26, 50 U. S. C. (Supp. V) 590). The Code substituted for the Judicial Council a Court of Military Appeals, composed of civilians, to review errors of law only, automatically in capital cases among others, and on petition in the remaining cases (Art. 67, 50 U. S. C. (Supp. V) 654). By Executive Order 10214, dated February 8, 1951, the President prescribed a new Manual for Courts-Martial which became effective May 31, 1951.

have had the opportunity to present all their contentions.[24]

C. THE PETITIONS FOR HABEAS CORPUS RAISE NO JURISDICTIONAL ISSUE

If we are correct in our interpretation of the scope of review of courts-martial by civil courts in habeas corpus, then the petitions in the instant cases raised no jurisdictional issue within the

[24] It is noteworthy that in the Uniform Code of Military Justice Congress provided (50 U. S. C. (Supp. V) 663, 64 Stat. 132):

"Art. 76. *Finality of court-martial judgments.*

"The appellate review of records of trial provided by this code, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this code, and all dismissals and discharges carried into execution pursuant to sentences by courts-martial following approval, review, or affirmation as provided by this code, shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in article 73 and to action by the Secretary of a Department as provided in article 74, and the authority of the President."

The 1948 revision of the Articles of War contained a similar provision (Article of War 50 (h), 10 U. S. C. (Supp. II) 1521 (h)) as well as a finality provision with respect to actions on petitions for a new trial (Article of War 53, 10 U. S. C. (Supp. II) 1525). See *Gusik* v. *Schilder*, 340 U. S. 128, 132–133. Presumably, Article 76 of the Uniform Code, like the former Articles of War, does not deprive the courts of their habeas corpus jurisdiction over courts-martial (see Brief for Respondent, *Gusik* v. *Schilder*, October Term, 1950, No. 110, pp. 12–18), but we believe that it does indicate the congressional purpose to limit judicial intervention to the traditional minimum.

competence of a civil court to review, particularly when considered in the light of the military record. Petitioners did not challenge the jurisdiction of the person or the subject matter nor the propriety of the sentence imposed.[25] They did endeavor to couch their petitions in terms which, although this Court has never expressly so held, we have assumed for the purposes of the case would, under modern concepts, be sufficient to

[25] (a) The courts-martial were lawfully appointed by the Commanding General, Twentieth Air Force, empowered to appoint a general court-martial by Article of War 8 (10 U. S. C., 1946 ed., 1479). (b) Under the provisions of Article of War 92 (10 U. S. C., 1946 ed., 1564), the courts-martial had jurisdiction over the offenses of murder and rape. The jurisdiction conferred by this Article as to such offenses is qualified by the provision that no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of "peace." However, the offenses here involved were committed on the Island of Guam, and thus not within the geographical limits of the States of the Union and the District of Columbia. Furthermore, the Joint Resolution of July 25, 1947, Chapter 327, Section 3, 61 Stat. 451, in terminating the state of war for certain purposes, did not terminate it for the purpose of Article of War 92 (see also *Kahn* v. *Anderson*, 255 U. S. 1, 9–10). (c) Petitioners were subject to be tried by court-martial since they were members of the United States Air Force at the time of the commission of the offenses and of the trial by courts-martial, and were assigned to the 12th Air Ammunition Squadron situated on the Island of Guam. (d) The death sentences adjudged by the courts-martial were authorized by Article of War 92 which at the time of the commission of the offenses provided that any person subject to military law who commits murder or rape shall suffer death or imprisonment for life as a court-martial may direct (10 U. S. C., 1946 ed., 1564).

raise a jurisdictional issue, *i. e.*, denial of opportunity to be heard on their guilt or innocence in a hearing that can fairly be characterized as a trial. However, when the petitioners' general characterizations of a denial of fundamental rights to a trial are examined in the light of the facts alleged in support of the allegations, as well as of the record within the system of military justice,[26] it is evident from the petitions themselves that, in actuality, petitioners are merely seeking redetermination of issues which they could and did fairly present before the military authorities and which those authorities fairly considered. They really are seeking review of military determinations with which they disagree, and are not merely attacking jurisdiction. As a matter of fact, some of petitioners' allegations do not raise an issue of jurisdiction within the concept of jurisdiction that pertains in relation to collateral attack on federal criminal convictions.

1. *Confessions.*—Certainly Dennis' attack on the admissibility of his confessions raises no jurisdictional question. Petitioner was not only given the opportunity to, but actually did, raise that issue in the court-martial itself and at every subsequent stage of review. The petitioner seeks merely re-evaluation of the evidence pertaining to coercion and duress, a right he clearly does not

[26] It is established that the sufficiency of the petitions must be tested in the light of the return. *Walker* v. *Johnston*, 312 U. S. 275, 284. See the opinion below, R. 23, fn. 1.

have. *Whelchel* v. *McDonald*, 340 U. S. 122, 124, 126 (*supra*, p. 47); *Collins* v. *McDonald*, 258 U. S. 416, 420–421 (*supra*, p. 41); *Swaim* v. *United States*, 165 U. S. 553, 560–561 (*supra*, pp. 40–41); *Romero* v. *Squier*, 133 F. 2d 528, 532 (C. A. 9) (defense of entrapment), certiorari denied, 318 U. S. 785. As the court below pointed out (R. 36), "Upon the face of the papers presented by the petitioner the issue was, in the light most favorable to him, clearly debatable, and there was substantial evidence in support of the conclusion" against his allegations. An objection to the admissibility of evidence, even on constitutional grounds, does not support a collateral attack on criminal judgments by either habeas corpus or a motion under 28 U. S. C. 2255.[27] *Smith* v. *United States*, 187 F. 2d 192, 197 (C. A. D. C.), certiorari denied, 341 U. S. 927; *Burall* v. *Johnston*, 134 F. 2d 614 (C. A. 9), certiorari denied, 319 U. S. 768.[28]

[27] The same comments apply to the charge that Calvin Dennis' confessions were coerced.

[28] The failure, if any, to advise Herman Dennis of his constitutional privilege against self-incrimination, did not render the hair inadmissible in evidence. *Powers* v. *United States*, 223 U. S. 303, 314; *Wilson* v. *United States*, 162 U. S. 613, 623; *United States* v. *Freeman*, 167 F. 2d 786, 790–791 (C. A. 7), certiorari denied, 335 U. S. 817; *United States* v. *Klinger*, 136 F. 2d 677, 678 (C. A. 2), certiorari denied, 320 U. S. 746.

Moreover, it has been held, in an opinion by Mr. Justice Holmes, that an error, if it be one, in requiring a defendant to stand up and walk before the jury (an alleged violation of the right against self-incrimination) did not go to the jurisdiction of a territorial court so as to be attackable on habeas corpus. *Matter of Moran*, 203 U. S. 96, 105.

2. *Detention.*—Insofar as the argument is separate from that on the admissibility of the various confessions, petitioners' allegations concerning their detention in the Guam jail—a contention also presented to and decided by the military authorities—obviously raise no issue of jurisdiction. The rule of *McNabb* v. *United States,* 318 U. S. 332, applies only in the federal courts and is not imposed by the due process clause. See *McNabb* v. *United States,* 318 U. S. at 340; *Lyons* v. *Oklahoma,* 322 U. S. 596, 597; *Gallegos* v. *Nebraska,* 342 U. S. 55, 63–64, 72, 73. And even if, as is not the case, a similar rule were made applicable by military law, violation of the rule would not deprive the court-martial of jurisdiction or render the proceedings null and void, *Richardson* v. *Zuppmann,* 81 F. Supp 809, 813–814 (M. D. Pa.), affirmed on the opinion below, 174 F. 2d 829 (C. A. 3). Federal criminal convictions obtained in violation of the *McNabb* rule cannot be attacked on that ground in habeas corpus. *Miller* v. *Hiatt,* 141 F. 2d 690 (C. A. 3); *Smith* v. *United States,* 187 F. 2d 192, 197 (C. A. D. C.), certiorari denied, 341 U. S. 927, and cases cited. (See also *infra,* pp. 77 ff.)

3. *Counsel.*—Although petitioners allege denial of effective assistance of counsel, it is indisputable that (a) they did in fact have counsel who had ample time to prepare for trial (*supra,* pp. 12–14, 17–18) and (b) that this issue was presented to and determined by the military in the course of appellate review (*supra,* pp. 20–21.

22, 25). Dennis is really seeking review of the decision of the military authorities as to the availability of Lt. Col. Daly,[29] and Burns a review of the conduct of his own personally selected counsel. Certainly the competence and preparation of counsel do not present an issue which goes to the jurisdiction of the court-martial. *Hiatt* v. *Brown*, 339 U. S. 103, 110–111, expressly so holds. Furthermore, the allegations of denial of the right to counsel are so clearly contradicted by the admitted facts (*supra*, pp. 12–14, 17–18; *infra*, pp. 79–80) as not to raise an issue which would require a hearing in a federal proceeding under 28 U. S. C. 2255. Cf. *Close* v. *United States*, 198 F. 2d 144 (C. A. 4), No. 130 Misc., O. T. 1952, certiorari denied, 344 U. S. 879.

4. *Alleged atmosphere of terror.*—The allegation that the trials were "conducted in an atmosphere of terror, hysteria and vengeance" is an obvious attempt to raise a jurisdictional issue within the concept applied to state courts in *Moore* v. *Dempsey*, 261 U. S. 86, but it is wholly unsupported by any facts except the statement in Chaplain Grimmett's affidavit that there was a rumor that a riot would ensue if a conviction was not obtained. Certainly, such a rumor is not an allegation of fact supporting this serious

[29] The determination of "availability" is not a matter reviewable in civil courts. Cf. *Hiatt* v. *Brown*, 339 U. S. 103; *Kahn* v. *Anderson*, 255 U. S. 1; *Swaim* v. *United States*, 165 U. S. 553; *Mullan* v. *United States*, 140 U. S. 240; *Bishop* v. *United States*, 197 U. S. 334; *Martin* v. *Mott*, 12 Wheat. 19.

charge, particularly where it appears on the face of the record that all members of the court were summoned from distant stations to conduct a trial at a place which is wholly under military control (*supra*, p. 6). To assume that a court-martial under such circumstances would be subject to mob domination is absurd. This issue too was presented to, and determined by the military authorities. *Supra*, pp. 21, 27–28.

5. *Alleged suppressed evidence and subornation of perjury.*—Only the allegations that the prosecution knowingly used perjured testimony[30] and knowingly suppressed material evidence present, on their face, an issue so fundamental to the concept of a trial as possibly to raise an issue of jurisdiction. These issues were also decided by the Air Force (*supra*, pp. 25–27). If review by civil courts extends at all beyond the traditional limitation of jurisdiction,[30] and if such review can be had at all where the claim had been fully considered by the military,[31] then

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[30] *Carter* v. *Woodring*, 92 F. 2d 544, 546 (C. A. D. C.), certiorari denied, 302 U. S. 752 (*supra*, p. 41), held that a civil court could not inquire into far more extensive charges of subornation of perjury and suppression of evidence than those made here. See also *Keyes* v. *United States*, 109 U. S. 336, and *Swaim* v. *United States*, 165 U. S. 553, 560–561 (*supra*, p. 41).

[31] *Whelchel* v. *McDonald*, 340 U. S. 122, 124, indicates that a civil court would have no competence where the charge of perjury, etc., was made to, and determined by, the appropriate military authority. *Swaim* v. *United States*, 165 U. S. 553, 560–561, is to the same effect (charge that court-martial member was personally biased against accused).

it would seem that such a charge, if sufficiently supported by allegations of fact, would present a matter which could be inquired into by the civil courts on habeas corpus. Cf. *Mooney* v. *Holohan*, 294 U. S. 103.

We do not believe, however, that the facts alleged in the petitions and affidavits support the charge made, when considered in the light of the record. It appears from the affidavit of Lt. Col. Daly, annexed to the petitions, that the alleged inducements to Calvin Dennis and the alleged existence of Philippine dog-tags and a blood-stained Navy officer's uniform were known to Daly before the trial. Similarly, it appears from the Daly affidavit, and those of Chaplain Grimmett and Miss Hill, that the asserted subornation of perjury and intimidation of witnesses by or on behalf of the prosecution were known to the affiants at the time the events occurred. There is no allegation in the petition that these alleged facts were not communicated by the affiants or others to petitioners or their counsel; the reasonable inference is that they were, and that if subornation or suppression occurred it was not unknown to petitioners or their counsel. The alleged existence of the dog-tags and Navy officer's uniform, and the alleged subornation, were not mentioned at the trial. If the defense knew the asserted facts and forbore to raise the issue, petitioners certainly could

not show denial of opportunity to present it. We doubt that, even in relation to a civil federal conviction, habeas corpus would lie on the basis of alleged facts which could have been and were not placed in issue at the trial. Cf. *Sunal* v. *Large*, 332 U. S. 174. And if the alleged facts were unknown at the time, it is incumbent on petitioners to make their ignorance clear and to allege the fraud in sufficient detail to warrant the district court in holding a hearing. Cf. *Darr* v. *Burford*, 339 U. S. 200, 218; *Schechtman* v. *Foster*, 172 F. 2d 339, 342 (C. A. 2), certiorari denied, 339 U. S. 924; *Coggins* v. *O'Brien*, 188 F. 2d 130, 138 (C. A. 1). They have done neither, but instead have rested on wholesale and obscure charges, largely based on hearsay, which they have not connected with the prosecution or the actual trial in any substantial way.

In any event, as pointed out above (*supra*, pp. 25–27), the allegations were reviewed during the course of direct appellate review, under the military system, before the sentence became final. Petitioners had an opportunity to present, and did present, the issues before the appropriate military authorities. After exhaustive investigation, the charges were rejected. Petitioners are, therefore, simply asking civil courts to review a matter which was properly before and properly passed upon by the military authorities, and thus to undertake a function which this Court

has consistently held is not within the civil province.

As to Calvin Dennis, the record of the Burns trial clearly shows that the credibility of Calvin Dennis was attacked at the trial on the ground that he had been offered inducements to testify (TR (B) 70–73, 64–69). As to this charge, the allegation of the knowing use of perjured testimony is merely, once again, an indirect way of attempting to secure a redetermination of a dispute in issue at the trial. Of course, the mere fact of retraction by Calvin Dennis does not support the charge of knowing use of perjured testimony. It would not be a sufficient basis for a new trial in a federal criminal case, much less a basis for collateral attack. *Wild* v. *Oklahoma,* 187 F. 2d 409 (C. A. 10); *United States* v. *Cordo,* 186 F. 2d 144, 148 (C. A. 2), certiorari denied *sub nom. Minkoff* v. *United States,* 340 U. S. 952; *Martin* v. *United States,* 154 F. 2d 269, 270 (C. A. 6); cf. *Valdez* v. *United States,* 244 U. S. 432; *Cobb* v. *Hunter,* 167 F. 2d 888 (C. A. 10), certiorari denied, 335 U. S. 832; *Slappey* v. *United States,* 110 F. 2d 528 (C. A. 5); *Henry* v. *United States,* 12 F. 2d 670 (C. A. 9).

II

THE COURT OF APPEALS CORRECTLY HELD THAT, IN VIEW OF THE FACT THAT ALL ISSUES RAISED BY THE PETITIONS FOR HABEAS CORPUS HAD BEEN CONSIDERED AND PASSED UPON BY THE MILITARY AUTHORITIES, THE DISTRICT COURT PROPERLY DENIED THE PETITIONS WITHOUT A HEARING ON THE BASIS OF THE MILITARY RECORD

Even assuming that the allegations of the knowing suppression of relevant evidence and the knowing use of perjured testimony were sufficiently supported to present an issue within the competence of civil courts to review, and even assuming that, under a broader concept of jurisdiction, some of the other allegations made by petitioner could be deemed to raise jurisdictional issues, the court below was clearly correct in holding that no hearing was required, since the district court could, on examination of the record, properly adopt the findings made by the military in the course of the corrective process available within the system of military justice.

The military record clearly establishes that every allegation made in the petitions for habeas corpus was presented before the military authorities in the course of review by the Board of Review, the Judicial Council, and The Judge Advocate General, and the review in connection with the application for a new trial under former Article of War 53 (10 U. S. C. (Supp. II)

1525). The record also shows that each contention was carefully considered, even to the point of ordering a special investigation of the allegations relating to the matters outside the court-martial record. See Statement, *supra*, pp. 18–28. In view of the fact that, as we have demonstrated in Point I, the system of military courts is, under our Constitution, and has from the beginning of our history been recognized as, a system as essentially separate from federal civil courts as are the judicial systems of the several states, the court below was justified in applying to habeas corpus review of court-martial judgments the general principles governing the reviewability by habeas corpus of state court judgments. This Court itself recognized the aptness of that analogy in *Gusik* v. *Schilder*, 340 U. S. 128, 131–132.

A. It is well established that where the constitutional questions raised by a person convicted in a state court have been considered and adjudicated on the merits in the state corrective proceedings, a federal court will ordinarily not re-examine, upon a writ of habeas corpus, the questions thus adjudicated, unless under its peculiar organization the state system was unable to afford a constitutionally adequate process for relief, or some "exceptional" circumstances of peculiar urgency are shown to exist." *Ex parte Hawk*, 321 U. S. 114, 117, 118; *House* v. *Mayo*, 324 U. S. 42, 48; *United States ex rel. Kennedy*

v. *Tyler,* 269 U. S. 13, 17; *Coggins* v. *O'Brien,* 188 F. 2d 130, 133, 137, 143–144, 150 (C. A. 1); *Goodwin* v. *Smyth,* 181 F. 2d 498 (C. A. 4); *Gault v. Burford,* 173 F. 2d 813 (C. A. 10); *Schechtman* v. *Foster,* 172 F. 2d 339 (C. A. 2), certiorari denied, 339 U. S. 924; cf. *Mooney* v. *Holohan,* 294 U. S. 103; *Moore* v. *Dempsey,* 261 U. S. 86, 91, 92.[32] Thus, if the corrective process

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[32] The application of such doctrine is not in conflict with the decision in *United States ex rel. Smith* v. *Baldi,* 192 F. 2d 540, 544 (C. A. 3), certiorari granted, 343 U. S. 903, or with *Moore* v. *Dempsey,* 261 U. S. 86. The doctrine that a federal court in a habeas corpus proceeding involving an attack on a judgment of a state court could adopt the findings of the latter on the issues presented was not disputed in the *Smith* case. There the Court of Appeals stated that the mere fact that matters averred in a federal petition for habeas corpus had "been decided on the merits by the highest state court is a fact to be given weight by a district court in passing upon petitions for habeas corpus. But that fact does not relieve the federal court of the duty to pass upon the merits of the petition" (192 F. 2d at 544). However, it is possible "to pass upon the merits of a petition" without a hearing thereon. Thus, what the court meant in the *Smith* case was that a federal court could not deny a habeas corpus petition merely because the issues raised therein had been adjudicated by a state court, but that it could adopt the findings of the state court and consider them against the allegations of the petition, which could be done without a hearing, as it was in the instant case and the *Smith* case. See also *Coggins* v. *O'Brien,* 188 F. 2d 130 (C. A. 1).

In *Moore* v. *Dempsey,* *supra,* the record showed that the existing corrective process of the state was inadequate to correct the alleged wrongs, because mob hysteria had permeated not only the trial procedure but the entire state judicial system, including its appellate processes, as well as

of a non-federal tribunal is shown to be adequate for the protection of one's fundamental human rights and such protection has been accorded an accused in consonance with the constitutional due process requirement, federal courts will not interfere by habeas corpus. See *Moore* v. *Dempsey, supra;* see also *Frank* v. *Mangum,* 237 U. S. 309. This rule is predicated, primarily, upon the "respect for the delicacies of the relationship between the United States and its courts, and the states and theirs, under a federal system such as ours." *Coggins* v. *O'Brien,* 188 F. 2d 130, 133 (C. A. 1); see *Darr* v. *Burford,* 339 U. S. 200, 205. As we have shown, the desirability of preserving the historical and constitutional separation of the civil and military powers is at least as good a reason for holding the rule applicable to judgments by courts-martial. Cf. *Gusik* v. *Schilder,* 340 U. S. 128, 131–132. Judgments of courts-martial, when affirmed by the required reviewing authority, are "final and conclusive," just as those of any state court, and hence "binding upon all departments, courts, agencies, and officers of the United States," subject only to review upon collateral attack in habeas corpus.

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the executive branch of the government, so that the federal court could not in good faith adopt the findings of the state court. Under the circumstances in that case, it was the duty of the federal court to hold a hearing in order, as this Court stated, to "find whether the facts alleged are true and whether they can be explained so far as to leave the state proceeding undisturbed" (261 U. S. at 92).

Art. 76, Uniform Code of Military Justice, 64 Stat. 132 (50 U. S. C. (Supp. V) 663).[33] Thus if traditional principles of court-martial review are to be expanded, there is no apparent reason why the doctrines governing the reviewability by habeas corpus in federal courts of judgments of state courts should be inapplicable to similar reviews of judgments of courts-martial.

The difference in degree of direct appellate review available to a person collaterally attacking a judgment of a state tribunal and to one similarly challenging a judgment of a military court is not substantial enough to warrant a difference in treatment. Military appellate review is now equivalent to that of the state judicial systems. See *supra*, pp. 53–57. And the fact that a person in state custody has opportunity, which is unavailable to one in military custody, for review of his conviction by this Court, prior to petitioning a federal district court for a writ of habeas corpus, does not call for any disparity in the action to be taken by the district court. For this Court rarely grants such a petition and may deny it on grounds unrelated to its merits; and in any case the review offered is solely of the state record and there is no new evidence. Moreover, one applying for federal habeas corpus to review a judgment of a state court may have less chance of an additional hearing on the merits,

[33] See fn. 24, *supra*, p. 57.

for, if this Court denies him certiorari, the District Court will on that ground, as a rule, deny his petition for habeas corpus without a hearing, even though the fact of refusal of certiorari has not resolved any issues on the merits. Cf. *Darr* v. *Burford*, 339 U. S. 200, 215–216, and cases cited *supra*, pp. 59–60. The truth is, as the court below pointed out (R. 30), "due process of law is not a fixed formula of unchanging and unchangeable elements. Due process of law in the armed forces has always been in some respects different from due process under civil authority" (see *Reaves* v. *Ainsworth*, 219 U. S. 296, 304; *French* v. *Weeks*, 259 U. S. 326, 335; *United States* v. *Hiatt*, 141 F. 2d 664, 666 (C. A. 3)), and it is as just and fair to abide by the decisions of the military reviewers in the case of court-martial prisoners as it is to accept the findings of state tribunals where state defendants are concerned.

Of course, where state courts are unable to grant a remedy—if one should be had—because the state judicial system is inadequate or through bias or other basic defect, the federal district court will not adopt the state's conclusions. See *Ex parte Hawk*, 321 U. S. 114, and the other cases cited *supra*, pp. 59–60. We assume the rule is the same for court-martial proceedings, but there is no occasion to invoke it here. The appellate and corrective processes within the Air Force and executive branch[34] were plainly adequate in

[34] The President confirmed both sentences (*supra*, p. 23).

structure and powers. Reviews of the court-martial records, and the contentions raised by petitioners on the basis of that record, were made by the Staff Judge Advocate, the Board of Review, the Judicial Council, The Judge Advocate General, and, presumably, the President. Consideration of the claims based on matters dehors the record was entrusted to the Judicial Council and The Judge Advocate General (particularly on the petitions for new trial). Extensive opinions were written by each of these military agencies, and it is clear that they considered all the issues now sought to be tried in the District Court.

The new trial procedure is of particular importance. Under former Article of War 53 (10 U. S. C. (Supp. II) 1525), and its successors under the Uniform Code (Arts. 73 and 74, 50 U. S. C. (Supp. V) 660 and 661, and sec. 12 of the Act of May 5, 1950, 64 Stat. 147, 50 U. S. C. (Supp. V) 740), Congress has made broad provision for post-conviction hearings for the correction of errors and redress of wrongs committed in court-martial proceedings. That such procedure may not in all respects accord with that in civil cases is not a valid objection. The fundamental fairness of military proceedings is not to be judged by standards imposed by civil law. Cf. *United States* v. *Fletcher*, 148 U. S. 84; *Martin* v. *Mott*, 12 Wheat. 19. The provisions relating to courts-martial are not violative of the due

process clause of the Constitution just because they differ in form from civil procedures (*Ex Parte Quirin,* 317 U. S. 1; *Reilly* v. *Pescor,* 156 F. 2d 632, 635 (C. A. 8)), certiorari denied, 329 U. S. 790, and it has been judicially said that the correction of errors provided under Article of War 53 "is much better adapted to reach justice than any within the power of the district court on habeas corpus." *Whelchel* v. *McDonald,* 176 F. 2d 260, 263 (C. A. 5), affirmed, 340 U. S. 122.[35]. Cf. Winship, *Court-Martial Procedure Compared with Criminal Procedure in Civil Courts* (1932), 1 Fed. Bar. J. No. 2, 3, 9–14.

During the new trial proceedings, petitioners were represented by counsel who was heard on

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[35] We have been advised by the Offices of the Judge Advocates General of the Army and the Air Force that during the period from February 1, 1949, to July 10, 1950, 389 applications under Article of War 53 had been received by them, and that 284 had been acted upon during that period. Relief was granted in 33 cases. From January 1, 1945, up to May 1, 1950, habeas corpus relief had been sought by at least 324 military prisoners of which number only one had been finally granted. See Wurfel, *Military Habeas Corpus: II,* (1951) 49 Mich. L. Rev. 699, 709. Thus, more than 11 per centum relief had been granted by Article of War 53 as against one-third of one per centum relief by habeas corpus over a much longer period. A current report from the Office of the Judge Advocate General of the United States Air Force states that during the period from March 1, 1949 to January 27, 1953, that office had received 442 applications for relief under Article of War 53, of which number 436 cases have been finally disposed, with some form of relief having been granted in 43 of those cases.

their behalf; they submitted affidavits and other documents, containing the same allegations as the instruments filed with their habeas corpus petitions.[36] The Judge Advocate General, who had previously had the same matters investigated by the Inspector General's Office, had a special board of officers re-examine the same matters after hearing petitioners' counsel. We submit that such a procedure accords fully with concepts of fundamental fairness, and peitioners cannot validly claim that the scope of the military remedy, properly administered, is inadequate or ineffective. If the personnel of the military reviewing authorities were so biased as to make the military system constitutionally inadequate to redress, in accordance with due process, the particular wrongs complained of here, it was incumbent upon petitioners so to allege in their petitions for habeas corpus, and to sustain the burden of detailed allegation and proof in that respect. *Darr* v. *Burford*, 339 U. S. 200, 218; *Coggins* v. *O'Brien*, 188 F. 2d 130, 138 (C. A. 1); *Schechtman* v. *Foster*, 172 F. 2d 339, 342 (C. A. 2), certiorari denied, 339 U. S. 924. This they have not done or sought to do. They have not alleged any irregularities or defects in the military appellate processes invoked by them, and

[36] A more detailed description of the new trial procedure is set forth in the Brief for Respondent in *Gusik* v. *Schilder*, 340 U. S. 128, Oct. Term, 1950, No. 110, at pp. 7–12.

none appear on the face of the military record.

In sum, petitioners were given full opportunity to, and did, tender before the military appellate authorities, and in a proceeding for a new trial, exactly the same issues raised in their habeas corpus petitions. *United States* v. *Dennis,* 4 CMR (AF) 872, esp. 888, 904–907; *United States* v. *Burns,* 4 CMR (AF) 907, esp. 923, 927–930; Resp. Exh. (Dennis) G, Appendix B, *infra,* pp. 89–109, Resp. Exh. (Burns) G, Appendix C, *infra,* pp. 110–131. Petitioners do not claim that the appellate authorities failed fully and fairly to consider all of their evidence relative to the various issues, or in any way denied them due process in the course of their appeals. Petitioners have been accorded the full measure of their rights and cannot relitigate on collateral attack issues fairly decided against them on the basis of substantial evidence. The habeas corpus court could and should, in the proper exercise of its discretion based on the military record before it, adopt or accept the military findings without an additional hearing. Cf. *Whelchel* v. *McDonald,* 340 U. S. 122; *Darr* v. *Burford,* 339 U. S. 200; *Ex Parte Hawk,* 321 U. S. 114; *United States ex rel. Kennedy* v. *Tyler,* 269 U. S. 13; *Frank* v. *Mangum,* 237 U. S. 309; *Schechtman* v. *Foster,* 172 F. 2d 339 (C. A. 2), certiorari denied, 339 U. S. 924.

B. The Court of Appeals did not content itself with summarily accepting the military findings,

but made a careful review of the materials pertaining to each of petitioners' charges (R. 35–43).[37] Rather than duplicate this survey, we shall collate and summarize the facts and circumstances shown by the military record which confirm the correctness of the decision of the courts below to accept the determinations made by the military tribunals.

1. *Confessions.*—The admissibility of Herman Dennis' confessions was thoroughly considered at each stage of the military proceedings. His charges of threats, etc. were denied under oath by the persons involved, and they swore that he was adequately advised of his rights. At the trial, he specifically denied being beaten (Resp. Ex. (Dennis) D, p. 15; 4 CMR (AF) at 895–896), and it was not until much later that he first made that claim; no satisfactory explanation has been offered for the belated change of position. Moreover, the confessions accord with the physical evidence (hairs, smock) and the testimony of others (*supra,* pp. 7–8). In these circumstances, as stated above (*supra,* pp. 59–60), there is no occasion whatever for the civil courts to retry the issue.[38]

2. *Detention.*—Apart from Herman Dennis' treatment during detention, which is discussed immediately above, petitioners' claim appears to

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[37] Judge Bazelon's review led him to dissent (R. 44–56).

[38] As for Calvin Dennis's confession and retraction, see *supra*, p. 66.

be simply that prolonged detention vitiates the courts-martial. But even if a *McNabb*-type rule were applicable to courts-martial, petitioners could not complain. For their detention before the confessions was not in violation of military law. There is no provision for bail in military law and confinement during investigation is common in serious cases. Article of War 46, 10 U. S. C. (Supp. II) 1517, (former Article of War 70), providing for pre-trial investigation, contemplates detention of at least eight days' duration as entirely lawful, for it provides for forwarding of charges to higher authority within eight days, "if practicable," after the accused is arrested or confined. The confessions here in issue were obtained within five days of detention, and any subsequent confinement, even if unlawful, would not bear on the admissibility of the confessions. Cf. *United States* v. *Mitchell*, 322 U. S. 65; *Carignan* v. *United States*, 342 U. S. 36.

Moreover, as we have already pointed out (*supra*, p. 61), the rule of *McNabb* v. *United States*, 318 U. S. 332, does not apply to military tribunals and there never has been a comparable rule in military proceedings. *Richardson* v. *Zuppann*, 81 F. Supp. 809, 813–14 (M. D. Pa), affirmed on the opinion below, 174 F. 2d 829 (C. A. 3). See also, for a more extensive discussion, the Brief for the United States in *United States* v. *Bayer*, 331 U. S. 532, Oct. Term, 1946, No. 606, at pp. 34–56. Petitioners rely on para-

graph 124 of the 1949 Manual for Courts-Martial, which refers to "the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States," but the same sentence adds that such rules are applicable only "so far as not otherwise prescribed in this manual." And paragraph 127, relied on by the Judicial Council (4 CMR (AF) at 900), deals comprehensively with confessions, carefully delineating those which are admissible and those which are not, but without mentioning or suggesting the *McNabb* rule or an equivalent. As for the provisions of the Guam Penal Code providing for speedy arraignment, the Judicial Council and The Judge Advocate General have determined that these provisions do not apply to military personnel detained by the Guam authorities (Resp. Ex (Dennis) D, p. 21; G, p. 7; 4 CMR (AF) 900; Appendix B, infra, p. 100).[39] Whether or not this is so, violation of the Guam Code would not affect the Courts-martial for this Court's decisions on state convictions (*supra*, p. 61) show that mere prolonged detention would not by itself constitute a violation of due process or a deprivation of the essentials of a fair trial.

[39] Chapter 35 of the *Civil Regulations with the Force and Effect of Law in Guam* (Codes of Guam, U. S. Govt. Printing Office, 1947), *infra*, p. 88, in effect at the time of petitioners' arrest, provided for the temporary detention of American military personnel pending delivery to military authorities. With respect to military personnel, Chapter 35 operated in lieu of the sections of the Guam Penal Code applicable to other offenders.

3. *Counsel.*—Each of Herman Dennis's assigned counsel admittedly had at least a month to prepare for trial, and one of them was previously quite familiar with the case, having served during the pretrial investigation (*supra,* p. 13). At the trial, petitioner expressed himself as satisfied with their selection. No question is now raised as to their competence, zeal, or fidelity to duty. Petitioner's desire for Lt. Col. Daly's services was not satisfied,[40] but it is to be noted that Daly was under very serious charges of misconduct and had submitted his resignation "for the good of the service" three weeks before the trial (*supra,* pp. 14, 20). A special investigation ordered by The Judge Advocate General later confirmed the propriety of the decision that Daly was unavailable. (Resp. Ex. (Dennis) G, pp. 10–12; Appendix B, infra, pp. 105–108.) There is certainly no basis for claiming an abuse of discretion. Cf. *Altmayer* v. *Sanford,* 148 F. 2d 161, 162 (C. A. 5); *Hiatt* v. *Smith,* 170 F. 2d 61, 64 (C. A. 3), reversed on other grounds, 336 U. S. 695.

Burns cannot complain of his deliberately selected counsel (Captain Drucker), nor can that counsel be said to have had insufficient time to prepare a defense in view of the facts that no

[40] Petitioner Dennis had written on April 19, after the final statement that Daly was unavailable, that in view of the fact that Daly was under charges he no longer desired Daly's services, but he nevertheless made the request, at the opening of the trial, without so informing the assigned counsel prior to that day (*supra,* pp. 13–14).

adjournment was requested and that the associate counsel were thoroughly familiar with the case, having been formally appointed over a month previously (*supra, pp.* 12–13, 17–18). Cf. *Morton* v. *Welch,* 162 F. 2d 840 (C. A. 6); *Setser* v. *Welch,* 159 F. 2d 703 (C. A. 4), certiorari denied, 331 U. S. 840.[41]

4. *Alleged suppression of evidence, subornation of perjury, etc.*—These charges, as we have noted, were the subject of a special, independent investigation made by the Inspector General's Office. The Judge Advocate General twice examined the reports of this special comprehensive investigation and twice concluded that the charges were baseless. *Supra,* pp. 22, 25–27; Appendix B, *infra,* pp. 103, 108, 109, C, *infra,* pp. 126, 129–131. The petitioners' affidavits do not indicate either that prosecution counsel were aware of these matters or that the defense was unaware of them. Nor do they give any explanation for the affiants' failure to call these matters to the attention of the defense or of the proper military authorities at the time they occurred. And even aside from these significant factors, the affiants' statements are not of the calibre—

[41] On the basis of Chaplain Grimmett's own affidavit, and the official letter attached thereto, one must conclude that there is no ground whatever for the half-charge that the military authorities interfered with petitioners' attempt to get counsel by curtailing the collection of funds. It is evident that the effort was simply to see that the funds were collected in a regular manner and that there was no coercion to contribute.

in specificity, consistency, or factual grounding—which would call upon the court to reject the inquiry conducted by the Air Force and to substitute one of its own. Moreover, the allegations as to attempted subornation of perjury by prosecution investigators, if true, could hardly have injured petitioner Dennis since no evidence alleged to be perjured was used against him, and the charges of intimidation must face the fact that several airmen did testify for the defense (*supra,* pp. 15, 17).[42] Burns' charge that Calvin Dennis perjured himself at the Burns trial was fully considered at that time and during the course of review (Resp. Ex. (Burns) D, p. 5, 4 CRM (AF) 907, 926; Resp. Ex. (Burns) G, pp. 7–10, Appendix C, *infra,* pp. 121–126.

5. *Alleged atmosphere of terror.*—As already noted (*supra,* pp. 27–28), the sufficient answer to the charge that the courts-martial met in an atmosphere of terror and hysteria are the facts that the members were officers from distant stations, and not subject to mob pressure since Guam was under military control. The court below also points out (R. 40) that they "frequently and intensively questioned witnesses for the prosecution."

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[42] The allegation that specimens of Herman Dennis' hair were "planted" as evidence against him is wholly unsupported by petitioners' affidavits and was rejected, after consideration, by the military reviewing authorities. *Supra,* pp. 25–27; Appendix B, *infra,* pp. 108–109.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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CHARLES B. MURRAY,
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OSCAR H. DAVIS,
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Of Counsel.

JANUARY 1953.

APPENDIX A

The pertinent provisions of the Articles of War, as amended by the Act of June 4, 1920, c. 227, subchapter II, 41 Stat. 787, and the Act of June 24, 1948, c. 625, Title II, 62 Stat. 627, provided as follows:

Art 47 [10 U. S. C. (Supp. II) 1518].

(c) *Action on record of trial.*

Before acting upon a record of trial by general court-martial or military commission, or a record of trial by special court-martial in which a bad-conduct discharge has been adjudged and approved by the authority appointing the court, the reviewing authority will refer it to his staff judge advocate or to The Judge Advocate General for review and advice; and no sentence shall be approved unless upon conviction established beyond reasonable doubt of an offense made punishable by these articles, and unless the record of trial has been found legally sufficient to support it.

Art. 48 [10 U. S. C. (Supp. II) 1519].

Confirmation.

In addition to the approval required by article 47, confirmation is required as follows before the sentence of a court-martial may be carried into execution, namely:

a. By the President with respect to any sentence—(1) of death, * * *

Art. 49 [10 U. S. C. (Supp. II) 1520].

Powers incident to power to confirm.

The power to confirm the sentence of a court-martial shall be held to include—

a. The power to approve, confirm, or disapprove a finding of guilty, and to approve or confirm so much only of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense:

b. The power to confirm, disapprove, vacate, commute, or reduce to legal limits the whole or any part of the sentence;

c. The power to restore all rights, privileges, and property affected by any finding or sentence disapproved or vacated;

d. The power to order the sentence to be carried into execution;

e. The power to remand the case for a rehearing under the provisions of article 52.

Art 50 [10 U. S. C. (Supp. II) 1521].

(d) *Action by Board of Review when approval by President or confirming action is required.*

Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President or confirmation by any other confirming authority is submitted to the President or such other confirming authority, as the case may be, it shall be examined by the Board of Review which shall take action as follows:

(1) In any case requiring action by the President, the Board of Review shall submit its opinion in writing, through the Judicial Council which shall also submit its opinion in writing, to the Judge Advocate General, who shall, except as herein otherwise provided, transmit the record and the Board's and Council's opinions, with his recommendations, directly to the Secretary of the Department of the Army for the action of the President: *Provided*, That the Ju-

dicial Council, with the concurrence of the Judge Advocate General shall have powers in respect to holdings of legal insufficiency equal to the powers vested in the Board of Review by subparagraph (3) of this paragraph.

(2) In any case requiring confirming action by the Judicial Council with or without the concurrence of the Judge Advocate General, when the Board of Review is of the opinion that the record of trial is legally sufficient to support the sentence it shall submit its opinion in writing to the Judicial Council for appropriate action.

* * * * *

(h). *Finality of court-martial judgments.* The appellate review of records of trial provided by this article, the confirming action taken pursuant to articles 48 or 49, the proceedings, findings, and sentences of courts-martial as heretofore or hereafter approved, reviewed, or confirmed as required by the Articles of War and all dismissals and discharges heretofore or hereafter carried into execution pursuant to sentences by courts-martial following approval, review, or confirmation as required by the Articles of War, shall be final and conclusive, and orders publishing the proceedings of courts-martial and all action taken pursuant to such proceedings shall be binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon application for a new trial as provided in article 53.

Art. 53 [10 U. S. C. (Supp. II) 1525]. *Petition for new trial.*

Under such regulations as the President may prescribe, the Judge Advocate Gen-

eral is authorized, upon application of an accused person, and upon good cause shown, in his discretion to grant a new trial, or to vacate a sentence, restore rights, privileges, and property affected by such sentence, and substitute for a dismissal, dishonorable discharge, or bad conduct discharge previously executed a form of discharge authorized for administrative issuance, in any court-martial case in which application is made within one year after final disposition of the case upon initial appellate review: *Provided*, That with regard to cases involving offenses committed during World War II, the application for a new trial may be made within one year after termination of the war, or after its final disposition upon initial appellate review as herein provided, whichever is the later: *Provided*, That only one such application for a new trial may be entertained with regard to any one case: *And provided further*, That all action by the Judge Advocate General pursuant to this article, and all proceedings, findings, and sentences on new trials under this article, as approved, reviewed, or confirmed under articles 47, 48, 49, and 50, and all dismissals and discharges carried into execution pursuant to sentences adjudged on new trials and approved, reviewed, or confirmed, shall be final and conclusive and orders publishing the action of the Judge Advocate General or the proceedings on new trial and all action taken pursuant to such proceedings, shall be binding upon all departments, courts, agencies, and officers of the United States.

Art. 92 [10 U. S. C. (1946 ed.) 1564]. *Murder; rape.*

Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court martial may direct; but no person shall be tried by court martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

Chapter 35 of the Civil Regulations With the Force and Effect of Law in Guam (Codes of Guam, U. S. Government Printing Office, 1947) provides:

Civil Arrest of Military Personnel

1. Whenever a member of the military forces of the United States is arrested by civil authorities, the offender shall be taken to the police station where the charge shall be investigated. If the charge is considered substantial, he may then be released upon his own cognizance or turned over to military authorities. Should the chief of police consider the charge of a sufficiently serious nature so that special action is necessary or that the release of the offender would be detrimental to his own or the public welfare, the offender may be held pending action on the report of the chief of police to military authority.

2. The chief of police will within 24 hours of the arrest, forward a report to the commanding officer of the offender and will set forth therein the offense alleged, such details as may be necessary to permit the commanding officer to take intelligent action on the case, and the names of such witnesses as may be available. He will also forward one copy of this report to the office of the Governor, for file.

APPENDIX B

DEPARTMENT OF THE AIR FORCE

OFFICE OF THE JUDGE ADVOCATE GENERAL

Washington 25, D. C.

ACTION UPON APPLICATION FOR RELIEF UNDER SECTION 12, ACT OF 5 MAY 1950

The application of Private Herman P. Dennis, Jr., AF 18 101 483, formerly of the 12th Ammunition Squadron, APO 264, for relief as provided by Section 12, Act of 5 May 1950 (formerly Article of War 53) in relation to his trial by court-martial (ACM 1892), submitted to me by petition, is *denied.*

Signed REGINALD C. HARMON,
Major General, USAF,
The Judge Advocate General,
United States Air Force.

Dated: 28 January 1952.

DEPARTMENT OF THE AIR FORCE

OFFICE OF THE JUDGE ADVOCATE GENERAL

Washington 25, D. C.

28 January 1952.

AFCJA-34/ACM 1892
Memorandum Opinion
Subject: Petition of Private Herman P. Dennis, Jr., AF 18 101 483, formerly of the 12th Am-

munition Squadron, APO 264, for Relief under Section 12, Act of 5 May 1950 (formerly Article of War 53)

1. The accused was tried by general court-martial at Headquarters, Twentieth Air Force, APO 234, from 9 to 16 May 1949, and was found guilty of rape (specification 1) and premeditated murder (specification 2) in violation of Article of War 92. He was sentenced to be put to death in such manner as the proper authority might direct, all members of the court present at the time the vote was taken concurring. The sentence was approved by the reviewing authority and upon appellate review the Board of Review and the Judicial Council expressed opinions in writing that the record of trial in this case was legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. As The Judge Advocate General, I concurred in these opinions and recommended that the sentence be confirmed and carried into execution. On 3 August 1951 the sentence was confirmed by the President pursuant to the provisions of Article of War 48, and was ordered to be carried into execution.

2. A detailed statement of the facts appearing in the record of trial in this case is contained in the opinion of the Board of Review (29 November 1949) and in that of the Judicial Council (18 July 1950) in ACM 1892, *Herman P. Dennis, Jr.*, 4 Court-Martial Reports (AF) 872.

On the evening of 11 December 1948 Miss Ruth Farnsworth was working alone in the Jade Shop, a retail civilian establishment located on Dadero

Road, Route 1, between the Ammunition Depot area and North Field, on the island of Guam. At about 8:30 p. m. the lights in the shop were extinguished, although ordinarily the shop remained open until 9:00 p. m. At about 10:00 p. m. Mr. John Arnold, a business associate of the proprietor of the Jade Shop, who sometimes slept there at night, returned to the shop and parked in front. He noticed that the two front doors of the shop were open, and although the lights were out, the generator outside and in back of the shop which supplied it with light, was still running, and inside he found the shop in disorder. On entering the building, he found an orange-red scarf on the floor, and with the aid of a flashlight, he found a bracelet and pendant watch, all identified as belonging to Miss Farnsworth; and he noticed that the cash drawer seemed to be intact. Not finding any of the female clerks in the building, and suspecting foul play, Mr. Arnold went outside, hailed a passing military patrol and reported the matter. A further investigation with one of the police personnel revealed on the floor of the shop, at about the same place where the other articles were found, several bobby pins, hairpins, a length of rope, and a part of a red lacquered fingernail similar to a portion broken from Miss Farnsworth's finger. The investigation showed further that a show case had been pushed out of place, all indicating that a struggle had occurred. Outside it was discovered that one of the wires connecting the generator with the shop had been disconnected, and truck tire tracks appeared on a secondary road leading up to a

spot near a pig pen about two hundred yards back from the shop in the jungle. Prior to being hailed by Mr. Arnold that evening the patrolmen had driven by the Jade Shop at about 8:20 p. m. and the lights were on, but when they re-passed the shop about 9:00 p. m. the lights were out; and Miss Blackledge, the other clerk in the shop, passing the shop on her way to a dance, at about 8:30 p. m., noticed that the lights were off at that time. When passing the shop at about 8:20 p. m. the patrolmen noticed two customers in the shop with Miss Farnsworth, one dark and tall, and the other shorter, heavier set, and not so dark, resembling respectively petitioner and Staff Sergeant Robert W. Burns, an accomplice who was convicted in a separate trial of the same offenses as was this petitioner. A search for Miss Farnsworth (hereafter called the victim) was organized and the following morning (12 December 1948) one of her sandals was found near the shop. This intensified the search for her until on the morning of 13 December 1948 she was found lying on her back in a small clearing in the jungle (called the boondocks), grievously beaten and abused, still alive but unconscious, dirty, her clothing raised above her hips, and her legs spread wide apart, indicating that she had been the victim of a criminal attack. Taken to the hospital an examination showed that her jaw was fractured and she had been abused to the extent that almost no portion of her body was free of bruises and abrasions. Her fingernails were broken, her vagina had been injured, and she had been choked. She died a few hours after being

taken to the hospital, without gaining consciousness, as a result of brain injuries caused by blows on the face and head, shock, and exposure to the elements. The other sandal was found on 14 December 1948 in the jungle some distance from the shop.

At about 7:45 p. m. on 11 December 1948 petitioner and Burns were observed loitering near a fence a short distance from the Jade Shop; and about 9:45 p. m. a civilian picked up the petitioner on the highway about three-fourths of a mile from the shop. Petitioner, Calvin Dennis, and Robert W. Burns had arrived at the Jade Shop in a truck which was being operated as a shuttle bus between two points on the highway near which the shop was located. Calvin Dennis had been assigned to drive the truck on the night of the crime, and the records which were required to be kept of trips made between the two points, and the time thereof, showed that no trip had been made between approximately 7:30 p. m. and 9:30 p. m. Upon a search of the truck subsequently made there was found in the back of the seat a part of the victim's smock which she had frequently worn at work.

On 7 January 1949 petitioner and his two accomplices were taken into custody. Four separate statements were made by petitioner, two on 11 January 1949, one on 12 January 1949, and one on 13 January 1949. The first two of these statements were wholly in the handwriting of petitioner and the remaining two were in question and answer form. In these statements petitioner told in detail how he, with Robert W. Burns and Calvin Dennis, had gone to the Jade Shop on the

night in question; that when he saw Burns strike the victim, he ran out of the shop and disconnected the generator; that he then returned to the shop, picked up the girl, and accompanied by Burns and Calvin Dennis, took her into the jungle. There she was laid down and stripped, and petitioner stated he had intercourse with her three times, following which he left the scene alone and from the highway caught a ride back to North Field, where he got out and returned to his squadron on foot. Hairs and fibres taken from the rope were identical with hair taken from the head of the victim and fibres from her sweater and dress. Hairs found upon the smock were identical with pubic hair taken from petitioner. The blankets taken from the truck contained hair similar in characteristics to that of the victim and of petitioner, and also red wool fibres similar to those from the victim's sweater. A hair similar to that of the victim was taken from petitioner's shirt. On 12 January 1949 petitioner re-enacted his part in the crime, at the Jade Shop, and he pointed out the trail in the jungle in the vicinity where the sandals (or slippers) of the victim were found.

Witnesses testified for the defense that they had seen petitioner at the post theater variously between the hours of 7:30 p. m. and 9:30 p. m., and about rags kept in the truck for use in washing it. Petitioner testified as to attending the movie theater between 7:45 p. m. and 9:30 p. m. on the night of 11 December 1949. Petitioner also testified for the limited purpose of showing the manner in which the statements were taken

and to show that they were involuntarily given and extracted by the use of coercive tactics, promises, and threats.

3. By the petition subscribed 31 August 1951 by his attorney in fact, the petitioner requests any and all relief afforded by Section 12, Act of 5 May 1950 (formerly Article of War 53). In support of the petition there are appended an affidavit of petitioner that Calvin Dennis is not his brother, half-brother, or in any way related to him; a further affidavit of petitioner detailing threats, promises, and duress alleged to have been used against him; two affidavits of Mr. Edward F. Daly and one of Miss Mary Louise Hill; an affidavit of Calvin Dennis which is in general effect a retraction of his testimony at the trial of his accomplice Robert W. Burns; a memorandum in support of the petition containing a motion for a new trial; and a copy of the memorandum of counsel submitted to the Judicial Council under date of 16 June 1950 for consideration by its members. All of these various affidavits, briefs, and attachments to the petition have been considered, and will be made the subject of later discussion.

Counsel for petitioner requested an oral hearing to present argument on the petition, which was had on 30 October 1951 before a board of officers appointed by me to hear argument, consider all evidence and make a recommendation to me as to appropriate action to be taken on the petition. At this oral hearing counsel for petitioner treated the instant case and the two involving separate trials of the accomplices as a group and presented argument on five points, con-

sidered to be applicable to all three cases for convenience of joint discussion, as follows: The rights of accused at the time they were taken into custody on 7 January 1949; the rights of accused with regard to the admission by the court of confessions and other evidence, at the time of the court-martial, which in this case began 9 May 1949; a consideration of the affidavits of Calvin Dennis stating that his testimony at the trial of Robert W. Burns was false and was prompted by the promise of a light sentence; a consideration of the affidavits of Mr. Daly and Miss Hil' as tending to support the theory of the involuntary nature of the confessions of petitioner and Calvin Dennis, and reflecting upon the method of conducting the trial; and certain statements in the record claimed to be prejudicial—(a) that repeated reference was made at the trials that petitioner and Calvin Dennis, tried separately for the same offenses, were brothers, and (b) statements by the witness Sue I. Blackledge at the trial in the instant case about expressions by petitioner to her of abhorrence of racial segregation, unhappiness in the South and his desire to take her picture. These points will be separately discussed hereafter in this opinion in connection with others made obvious by the petition.

4. Statements of the facts contained in the record of trial appear in the opinions of the Board of Review and the Judicial Council in complete form, and in such detail that I consider it appropriate for purposes of this petition to present only a brief summation of such facts; and as such facts are not now in actual dispute,

but only certain contentions based on some of such facts, I shall limit this discussion to the confines of the actual matters raised by the petition, and at the oral hearing.

In the memorandum in support of the petition counsel point to the lack of authority of the Judicial Council to have considered matters *aliunde* the record, and then point out that reference in his confessions by petitioner concerning Calvin Dennis being his brother raises more than a reasonable doubt as to the genuineness of the confession. The memorandum then refers to the brief submitted to the Judicial Council and states:

> This brief places the attached affidavits in their proper perspective, thereby underlining the injustices which they indicate.

This brief (before Judicial Council) discusses some of the evidence, such as the failure of the expert witnesses to point out sufficient characteristics from the hair analyses to identify it as associated with any particular person (pages 3–4); and the lack of meaning attachable to the presence of petitioner near the vicinity of the Jade Shop on the day of the crime (page 5). Aside from these matters, however, the real gist of the entire brief is that the conviction cannot stand because of petitioner's fundamental rights to be held only under legal process, to have counsel from the moment of incarceration, and not to be convicted by use of an involuntary confession, have been violated (page 2).

Thus, considering the petition and its supporting memorandum and all the matters incorporated therein by reference, and the points urged

at the oral hearing, the grounds assigned as good cause for the relief sought narrow down to those which follow, each of which will be discussed separately herein.

First: What was the legal status of petitioner at the time of his arrest and detention by the United States naval authorities on Guam on 7 January 1949?

At the oral hearing counsel for the petitioner argued that at the time of the arrest Guam was under the control of the United States acting through the Department of the Navy, officials of which department arrested petitioner and held him "incommunicado" until 12 January 1949, at which time he had signed confessions. Counsel contended that even though Guamanians are not citizens of the United States and the Constitution of United States does not apply to them, yet when the government of the United States operates in a civilian capacity, a citizen of the United States must be afforded at all times his constitutional rights; that at the time of petitioner's arrest the Department of the Navy had no jurisdiction over him, but only the Air Force, so that the arrest by the naval authorities was in the nature of a civil arrest because the naval authorities were acting on behalf of the civil government in Guam, not the military; that the Penal Code of Guam in force in January 1949 (Section 686) contained provisions for a speedy and public trial, provided for the right to counsel and the right of an accused to be informed of the nature of his offense, and contained a provision against self-incrimination (also provided for in Section 780c); that such Penal Code (Section 825) also

provides that an accused must be taken before the judge (magistrate) within 24 hours after his arrest, and provides (Section 1473) that the writ of habeas corpus cannot be issued as to any person in the military or naval service of the United States without the consent of the Governor of Guam after complying with certain procedures (Chapter 35, Civil Regulations—Civil Arrest of Military Personnel). From this counsel argued that at the very least petitioner was entitled to the protection of the Penal Code of Guam, meaning, as he contends, that when petitioner was arrested he had a right to be brought before a magistrate within 24 hours and be charged with a specific crime and to be advised by counsel of his rights against self-incrimination before he signed the confessions; and that since the civilian government violated its duties to these men, the Air Force participated in those illegal violations of rights under the Guam Code and the Constitution of United States, and therefore could not use the confessions thus illegally obtained to secure conviction. Counsel concluded that since it was shown that petitioner was "held in actual isolation" and was permitted contact with no one except the interrogating authorities, it follows that due process was not accorded because of the manner in which petitioner was "held, questioned, and not permitted to have advice or counsel."

The arguments of counsel on this point have been set forth at some length to introduce this statement that these contentions were presented by counsel in substantially the same form to the Judicial Council in this case, and the discussion of the point and the legal points raised by that

body in its consideration of the case have pertinence here in view of counsel's prior presentation. The Judicial Council held in this case, and I think rightly, that the accused did not have, and therefore was not deprived of, any right to a preliminary hearing before a committing magistrate or any other like authority, and stated:

> There is no provision for such preliminary hearing or arraignment in military law and accused had no such right under the laws of Guam, a military government deriving its authority from the United States and administered by the Department of the Navy. It should be observed that the accused was arrested under the authority of the military government of Guam and held under such authority until after the statements in issue had been made. Chapter 35, "Civil Regulations With the Force and Effect of Law in Guam" (United States Government Printing Office, 1947) provides for the detention of United States military personnel and with respect to such personnel, operates in lieu of Sections 825 and 847–849, Penal Code of Guam, which is applicable to other offenders.

I consider this statement of the law to be correct, and although the discussion occurred in connection with consideration of the evidentiary excluding rule announced in decisions of the United States Supreme Court (*McNabb* v. *United States*, 318 U. S. 332, and *Upshaw* v. *United States*, 335 U. S. 410) and was thus limited to the question of an accused's right to be brought promptly before a committing magistrate for a preliminary examination, in principle it meets with exactness and is dispositive of the arguments advanced for

petitioner in this case; and especially so when considered in the light of the considerable volume of evidence showing that petitioner was fully and explicitly warned of his testimonial rights and that the confessions were made voluntarily and were admissible within all rules applicable to the administration of military justice.

Second: What was the legal status of petitioner at the time of his court-martial beginning 9 May 1949 with regard to the admission in evidence of his confessions made 11, 12, and 13 January 1949?

This point comes as a corollary to the "First," and it is urged that since petitioner was denied rights accruing to him under the Code of Guam, *a fortiori*, the confessions extracted in violation of such rights were inadmissible, and hence a conviction based thereon cannot stand. I have pointed out the reasons why I consider the provisions of the Code of Guam to be inapplicable as creating or affecting the rights urged on behalf of petitioner. But, in addition, the argument loses force when it is considered that the four statements made by petitioner while he was being detained by the Guam authorities were received in evidence after presentation to the court of much evidence with respect to the voluntary nature of these confessions, including petitioner's own sworn testimony as a witness in his own behalf, and his denial that physical force was used against him. The conflict of evidence in this connection was presented to the court, and was resolved against petitioner. Thus, the issue of whether the statements were obtained by force

and duress, and without advice as to his rights, and whether they were voluntary, was raised, considered, and decided at the trial. The evidence as a whole, bearing upon the voluntary nature of the four statements of petitioner, presented a question of fact for the court, and it is my opinion that the court properly resolved the issue. After reading and re-reading the record of trial, there is no reasonable doubt in my mind that all the confessions were wholly voluntary, as the court decided, and were properly admitted. Where the evidence as to whether there was coercion is conflicting, or where different inferences may fairly be drawn from the admitted facts, the question whether a confession was voluntary is for the triers of the facts (*Lyons* v. *Oklahoma*, 322 U. S. 596; *Lisenba* v. *California*, 314 U. S. 219). Thus the court's decision on the voluntary nature of the testimony, arrived at from first-hand hearing and observation, is presumptively correct and will not be disturbed unless manifestly erroneous (*MGM Corporation* v. *Fgar*, 104 F. 2d 892; ACM 3597, *Maddle*, 4 Court-Martial Reports [AF] 573).

Third: Consideration of the affidavits of Calvin Dennis that his testimony at the trial of Robert W. Burns was false and was prompted by the promise of a light sentence.

This point has no application to this petitioner; it is in connection with the petition of Robert W. Burns that it has pertinence.

Fourth: Consideration of the affidavits of Mr. Edward F. Daly and Miss Mary Louise Hill as tending to support the theory of the involuntary

nature of petitioner's confessions, and as reflecting upon the method of conducting the trial.

Counsel argued that the mentioned affidavits support the allegations that petitioner makes with regard to the involuntary nature of his confessions, and in addition, cast serious doubts upon the propriety of these proceedings in Guam. This argument, insofar as it touches upon the question of whether the confessions were voluntary, has been met in the discussion occurring under "First" and "Second" and any further discussion would be repetitious. Insofar as this point touches upon the charges contained in the affidavits of Mr. Daly and Miss Hill regarding the method of conducting the trial, it should be noted that Mr. Daly alone makes the assertions contained in his affidavits, and no further substantiation of these allegations has been presented. Further, the various allegations and charges of Mr. Daly as set forth in his affidavits, and the various statements of Miss Hill, were made the subject of an exhaustive investigation by the Directorate of Special Investigation, Office of the Inspector General, United States Air Force, both from the standpoint of the charges made and the motives for making them. I have again reviewed the results of this investigation and I can arrive at no different conclusion than that previously reached that the charges are unfounded.

Fifth: Prejudicial statements in the record.

(a) It is contended by counsel that it was made to appear to the court that petitioner and Calvin Dennis were brothers. Affidavits of petitioner and Calvin Dennis to the contrary have been submitted. In three of his confessions peti-

tioner refers to Calvin Dennis as "my brother Calvin." Counsel argues that such reference to blood relationship might have caused the court, in weighing the truth of the confessions, to attach more weight and credibility to such evidence than if the two men had appeared to be unrelated. It is impossible to determine at this juncture whether the court would believe that a man making statements implicating his own brother would be impelled by higher motives of truth than an accomplice not so related, or whether, contrariwise, the court would suspect ulterior design, and attach less credibility to such statements. But such a determination involves conjecture and speculation of a high order, in which I am not required to indulge, because any conclusion reached by such a process could have no value in determining the weight of the evidence. The court must be presumed to have taken into consideration all matters affecting the testimony of witnesses when weighing the evidence, prior to making its findings (*Larsen* v. *Portland S. S. Company,* 66 F. 2d 326, 329) and I will not attempt to speculate in retrospect that the decision of the trial court on the credibility of witnesses could have been affected by evidence so intangible as that urged (*MGM Corporation* v. *Fear,* 104 F. 2d 892). Clear and convincing proof is required to set aside the judgment of a general court-martial, and matters of claimed injustice must be sustained "not as a matter of speculation but as a demonstrable reality" (*Adams* v. *United States ex rel. McCann,* 317 U. S. 269, 281).

(b) It is also contended that the decision of the court was affected by certain testimony of the witness Miss Blackledge (Record of Trial, page 77), to the effect that petitioner had stated to the witness his feeling of unhappiness at segregation, his unhappiness in the South, and his desire to take her picture. Counsel argue that this evidence was calculated to prejudice the court, and was not offered to prove premeditation, malice aforethough, or a particular frame of mind. The Manual provides (Manual for Courts-Martial, 1949, par. 140):

> In others, such as murder, a particular frame of mind must be proved—premeditation in the case of murder punishable by death—malice aforethought in all cases of murder. In those cases the specific intent or frame of mind may be established either by independent evidence, as, for example, words proved to have been used by the offender, or by circumstantial evidence, as by inference from the act itself.

It would appear that this evidence was properly admitted as a circumstance tending to show petitioner's feeling toward women, and his previous desires for female companionship. The record does not show that the evidence was introduced into the trial merely to prejudice the court, as is contended.

Sixth: Petitioner was denied counsel of his choice.

Statements appear in the affidavit of Mr. Daly (October 1949) that raise the point that petitioner was denied counsel of his choice. This entire matter was the subject of a most thorough dis-

cussion in the opinion of the Judicial Council, with which I concur, and which makes it unnecessary to elaborate here. Further, the independent investigation heretofore referred to disproves these contentions. The fact that Mr. Daly appeared as a witness during the trial, once for the prosecution and once for the defense, in addition to his connection with the case prior to the trial, as indicated by his testimony, both show definitely that a definite impropriety might have been involved had he appeared on behalf of petitioner. But the investigation further proved to my satisfaction that the Commanding Generals were entirely within their prerogative as enunciated by paragraph 45a, Manual for Courts-Martial, USAF, 1949, in declaring as not available the counsel chosen by petitioner, former Lieutenant Colonel Edward F. Daly, and that they did not have ulterior motives, as is intimated, in declaring him (Daly) unavailable. At the outset of the trial petitioner stated he desired to be represented by the regularly appointed defense counsel "but do wish to have Lieutenant Colonel Edward F. Daly to assist." The prosecution then explained to the court that Colonel Daly had been declared unavailable as military counsel for accused by the appointing authority, to which defense counsel responded (Record of Trial, page 4):

> However, I am aware that Colonel Daly is in a status which makes the stand of the prosecution and the Commanding General, Twentieth Air Force, proper.

It was then shown by amendment of orders that Lieutenant Colonel Adrian W. Tolen would act

as defense counsel and First Lieutenant Ensley as assistant defense counsel. After a motion for severance had been sustained by the court, and the court had decided that it would proceed with the instant case, and after a recess, the accused stated:

> I still want Captain Katz as Assistant to Colonel Tolen and Lieutenant Ensley,

with the result that in view of accused's specific request, the court directed that Captain Katz "should remain as a part of the defense."

Without regard to the legal rule that the determination of the availability of qualified defense counsel within the meaning of Article of War 11 is a matter exclusively within the discretion of the appointing authority whose determination is final (Manual for Courts-Martial, 1949, par 45a; *Hiatt* v. *Brown*, 339 U. S. 103; ACM 2437, *Quinn*, 3 Court-Martial Reports [AF] 108) or the further rule that petitioner may not complain that he was inadequately represented by his deliberately selected counsel (*Adams* v. *Hiatt*, 79 F. Supp. 433; *Morton* v. *Welch*, 162 F. 2d 840; *Setser* v. *Welch*, 159 F. 2d 703, cert den 67 S Ct 1510), the record shows that capable counsel had been made available to petitioner, that in open court he indicated clearly by whom he wished to be defended, and that throughout the trial he was defended by counsel (three) of his choice. Scrutiny of the record convinces me that petitioner was defended with loyalty, ability, and skill, which perforce attained for him the standards required by concepts of a fundamentally fair trial (*Moss* v. *Hunter*, 167 F. 2d 683; *Altmeyer*

v. *Sanford,* 148 F. 2d 161; *Romero* v. *Squier,* 133 F. 2d 528; *Liner* v. *Cozart,* 80 F. Supp. 540).

Seventh: Important evidence was withheld from the court at the trial.

Finally, it is contended that important evidence in the nature of Filipino identification discs (dog-tags) and a blood-stained Navy officer's uniform alleged to have been found in the vicinity of the crime about the time of its commission, was withheld from the court (Daly affidavit, dated 30 August 1951). Here again, this allegation was made the subject of a thorough investigation, from which I have concluded that the charge is baseless. Further, a presumption obtained that a person acting in the capacity of a public officer performed his duties properly (Manual for Courts-Martial, 1949, par. 125a; Manual for Courts-Martial, 1951, par. 138a) and such presumption of regularity may be indulged as to officers charged with the administration of military justice (CM 320618, *Garner,* 70 Board of Review 71; CM 332704, *Bilbo,* 81 Board of Review 185) and as to courts charged with protecting fully the rights of an accused person (*Rudolph* v. *Lockwood,* 2 F. 2d 319; *Johnson* v. *Wilson,* 131 F. 2d 1). Therefore, I hold, there being no clear showing to the contrary, that the officers who investigated this case, prepared and preferred charges and prosecuted the case before the court, were not remiss in the performance of their duties. They were vested with wide discretion in developing and sorting the evidence to be used, and in choosing the witnesses conceived to be necessary to present the case properly, and the order and manner in which the evidence

would be presented. Petitioner attempts to insinuate an element of doubt into the case by intimating that material evidence helpful to the defense was suppressed; but he fails to point out how such evidence was material to his defense, or how it affected or prejudiced him in any way. The force of such a suppositive argument is minimized by my own study of the reports of investigation of these matters, and I hold that in order to avail petitioner anything, such intimations and accusations must be supported by grounds less speculative and abstruse than those presented.

5. As previously stated, I have re-examined the reports of the comprehensive investigations which were conducted at my request, and I have examined the entire records in this and its allied cases, in the light of the grounds set forth in the petition, and I hold that the petition presents no good cause for the relief sought and that no injustice to petitioner is shown.

Therefore, no good cause for relief within the purview of Section 12, Act of 5 May 1950 (formerly Article of War 53) having been shown, the petition will be *denied*.

Signed REGINALD C. HARMON,
Major General, USAF,
The Judge Advocate General,
United States Air Force.

APPENDIX C

DEPARTMENT OF THE AIR FORCE

OFFICE OF THE JUDGE ADVOCATE GENERAL

Washington 25, D. C.

ACTION UPON APPLICATION FOR RELIEF UNDER SECTION 12, ACT OF 5 MAY 1950

The application of Staff Sergeant Robert W. Burns, AF39341855, formerly of the 12th Ammunition Squadron, APO 264, for relief as provided by Section 12, Act of 5 May 1950 (formerly Article of War 53) in relation to his trial by court-martial (ACM 1893), submitted to me by petition, is *denied*.

Signed REGINALD C. HARMON,
Major General, USAF,
The Judge Advocate General,
United States Air Force.

Dated: 28 January 1952.

DEPARTMENT OF THE AIR FORCE

OFFICE OF THE JUDGE ADVOCATE GENERAL

Washington 25, D. C.

28 January 1952.

AFCJA-34/ACM 1893
Memorandum Opinion
Subject: Petition of Staff Sergeant Robert W. Burns, AF39341855, formerly of 12th Ammunition Squadron, APO 264, for Relief under

Section 12, Act of 5 May 1950 (formerly Article of War 53)

1. The accused was tried by general court-martial at Headquarters, 19th Bombardment Wing (Medium), APO 334, on 27, 28, and 30 May 1949, and was found guilty of rape (specification 1) and premeditated murder (specification 2) in violation of Article of War 92. He was sentenced to be put to death in such manner as the proper authority might direct, all members of the court present at the time the vote was taken concurring. The sentence was approved by the reviewing authority and upon appellate review the Board of Review and the Judicial Council expressed opinions in writing that the record of trial in this case was legally sufficient to support the findings of guilty and the sentence and to warrant confirmation of the sentence. As The Judge Advocate General, I concurred in these opinions and recommended that the sentence be confirmed and carried into execution. On 3 August 1951 the sentence was confirmed by the President pursuant to the provisions of Article of War 48 and was ordered to be carried into execution.

2. A detailed statement of the facts appearing in the record of trial in this case is contained in the opinion of the Board of Review (14 March 1950) and that of the Judicial Council (18 August 1950) in ACM 1893, Robert W. Burns, 4 Court-Martial Reports (AF) 907.

On 11 December 1948 Miss Ruth Farnsworth (hereafter referred to as the victim) was employed as a part-time clerk at the Jade Shop,

a civilian store located on Dadero Road, Route 1, near the Marbo Base, and between the Ammunition Depot area and North Field, Island of Guam. At approximately 5:00 p. m. on that day Miss Sue Blackledge, a part-time clerk who worked with the victim at the store, quit work, leaving the victim to tend the store until 9:00 p. m., the usual closing time. At about 10:00 p. m. Mr. John Arnold, a business associate of the owner of the shop who sometimes stayed there at night, drove to the shop and stopped in the parking area in front. Noticing that the lights in the shop were off, although the generator outside and at the rear of the building which furnished light to the shop was running, he went into the shop and found on the floor a woolen, orange-red scarf, and with the aid of a flashlight, a bracelet and pendant watch, all identified as belonging to the victim. Mr. Arnold went outside and hailed a passing military patrol car, reported the matter, and in a further investigation with the military police there were found on the floor of the shop, at about the same place as the other articles were found just previously, several bobby pins, hairpins, a section of rope, and a part of a red lacquered fingernail similar to a portion broken from the victim's finger. The investigation showed further that a show case had been pushed out of place, although previously Mr. Arnold had noticed that the cash register seemed to be intact, and there were some streaks on the floor, all indicating that a struggle had taken place. Outside, Mr. Arnold and a patrolman discovered that one of the wires connecting the generator with the shop had been disconnected, and truck tire

tracks appeared on a secondary road leading up to a spot near a pig pen about 200 yards back in the jungle. Prior to being hailed by Mr. Arnold that evening the patrolmen had driven by the shop about 8:20 p. m., at which time the lights were on, but when they passed the shop again at about 9:00 p. m. the lights were out; and Miss Blackledge, passing the shop on her way to a dance at about 8:30 p. m., noticed that the lights were off at that time. The finding by an investigator of the victim's sandal in the area nearby the shop intensified the search for her until on the morning of 13 December 1948 she was found in a small clearing in the jungle (called the boondocks) four or five hundred yards back of the shop. She was unconscious but still alive, was lying on her back unclothed from waist to toes, with her legs spread wide apart. Her face was bloody and dirty and her body badly bruised and beaten. She was taken to a hospital where a medical examination and a subsequent autopsy disclosed that she had sustained a broken jaw, lacerations and abrasions about the face and hands, bruises and abrasions about the neck which could have been caused by a rope, and abrasions and scratches upon the shoulders, lower abdomen, and pubic regions. Her fingernails were broken, her vagina had been injured, and she had been choked. She died a few hours after being taken to the hospital, without regaining consciousness, as a result of brain injuries caused by blows on the face and head, shock, and exposure to the elements.

Calvin Dennis, one of the accomplices, testified that on the evening of 11 December 1948 he was

on duty driving a shuttle bus running between the Twelfth Ammunition area and North Field; that he, petitioner and Herman P. Dennis, Jr., went in the bus to the Jade Shop about 8:15 p. m.; and that while he was looking at some merchandise he saw petitioner strike the victim with his fist; that the victim screamed and fell to the floor, and Herman Dennis ran out of the shop, following which the lights went out; that he (Calvin) left the shop and returned to the parked truck, meanwhile hearing the girl say "Let go"; that while he was backing the truck to the highway, he saw Herman Dennis leave the shop with the girl in his arms; that he started to drive the truck up a secondary road to turn around and, looking back, he saw petitioner and Herman Dennis throw the victim into the back of the truck; that he drove the truck up the road to a pig pen, and while turning around he saw petitioner and Herman Dennis take the girl off the truck. Calvin Dennis then testified that he returned to his organization, and upon being called on the telephone by petitioner, he picked him up on the 9:30 p. m. run near the North Field gate. Calvin Dennis asked petitioner why he hit the girl, who told him that if he did not stop talking "you will get what she got." Petitioner then pulled out from his shirt a smock, explaining that he had taken it off of the victim, and he stuffed it behind the seat of the truck, where it was later found by an investigator. At that time petitioner stated to Calvin Dennis that he had had intercourse with the victim once or twice.

Other occurrences at about the time of the crime, are significant. At about 9:30 to 10:00

p. m. on 11 December 1948 two members of petitioner's organization, one of whom had been with him earlier in the evening, saw blood on his trousers around the region of the left thigh and below the belt. When inquiry was made petitioner stated he had been "cutting meat." Petitioner's duties as mess sergeant did not include cutting meat, and those who did so wore aprons; and ordinarily no meat would have been cut on that night (Saturday) because fowl was served on Sunday. The morning following the crime petitioner was observed in the mess hall. He appeared to be highly nervous and irritable and in a discussion of the subject of sex petitioner stated to another airman on duty as cook that he had had intercourse and "I got it the wrong way." Of further significance is the circumstance that on the evening of the crime the charge of quarters whose duties included supervising the shuttle bus saw Calvin Dennis make his first run at 7:10 p. m. but did not see him again until approximately 9:00 p. m. Analyses made by experts of scrapings taken from the cab and body of the truck and from blankets found therein, of the rope found inside the shop, and of the sweater, dress, and scarf worn by the victim, reveal hairs and fibres on the rope, the hairs corresponding in characteristics to the head hair of the victim, and the fibres corresponding to those from her sweater and dress; revealed human blood and pubic hairs in the scrapings from the truck; revealed human blood and hairs and fibres having the same characteristics as those from the victim and her clothing; and hair, caucasian and non-

caucasian, was discovered variously on the several materials examined.

Petitioner did not testify at his trial. Evidence was adduced by the defense that between 5:30 p. m. and 6:30 p. m. on the evening in question Calvin Dennis was seen at the Twin Palms Cafe, where he was boisterously arguing with a waitress, and that he had an odor of benzedrine about him. There was also testimony about the condition of the smock, and that the victim had not worn it that evening.

3. By the petition subscribed 31 August 1951 by his attorney in fact, the petitioner requests any and all relief afforded by Section 12, Act of 5 May 1950 (formerly Article of War 53). In support of the petition there are appended to it the following: An affidavit of Calvin Dennis stating that his testimony against petitioner at the trial was untrue, and was perjured because of threats and promises of a light sentence; a further affidavit of Calvin Dennis being in general effect a retraction of his testimony at the trial of petitioner and a repudiation of his own confession because of alleged coercion; copies of two affidavits of Mr. Edward F. Daly and a copy of one of Miss Mary Louise Hill; a memorandum in support of the petition containing a motion for a new trial; and a copy of the memorandum of counsel submitted to the Judicial Council under date of 16 June 1950 for consideration by its members. All of these various affidavits, briefs, and attachments to the petition have been considered, and will be made the subject of later discussion.

Counsel for petitioner requested an oral hearing to present argument on the petition, which was held on 30 October 1951 before a board of officers appointed by me to hear argument, consider all evidence and make a recommendation to me as to the appropriate action to be taken on the petition. At this oral hearing counsel for petitioner treated the instant case and the two cases involving separate trials of the accomplices as a group and presented argument on five points, considered by him to be applicable to all three cases for convenience of joint discussion, as follows: A discussion of the rights of the three airmen at the time they were taken into custody on 7 January 1949; their rights with regard to the admission by the court of confessions and other evidence, at the time their trials began; a consideration of the affidavit of Calvin Dennis stating that his testimony at the trial of petitioner was false and was prompted by the promise of a comparatively light sentence; a consideration of the affidavits of Mr. Edward F. Daly and Miss Mary Louise Hill as tending to support the theory of the involuntary nature of the confessions of Herman P. Dennis and of Calvin Dennis, and the latter's testimony at petitioner's trial, and reflecting upon the method of conducting the trial; and certain statements in the record claimed to be prejudicial—(a) that repeated reference was made at the trials of Calvin Dennis and Herman Dennis, Jr., tried separately for the same offenses, that they were brothers, which may have swayed the court in its estimate of the weight to be attached to the affidavits of Calvin Dennis,

and his testimony in the trial of this petitioner; and (b) that testimony by the witness Sue I. Blackledge in the trial of Herman P. Dennis, Jr., about abhorrence by the latter of racial segregation, unhappiness in the South, and his desire to take her picture, was introduced in order to prejudice the court. These points, where pertinent, will be separately discussed hereafter in this opinion, together with others raised by the petition.

4. Statements of the facts contained in the record of trial appear in the opinions of the Board of Review and the Judicial Council in complete form and in such detail that I consider it appropriate for purposes of this petition to present only a brief summation of such facts; and as such facts are not now in dispute, but only certain contentions based on some of such facts, I shall limit this discussion to the confines of the actual matters raised by the petition, and at the oral hearing.

In paragraph 6 of the petition the following statement appears:

> See attached memorandum as to the facts, rulings, or errors which are relied on as good cause for the remedy sought.

Paragraph 7 then lists the documents and affidavits relied upon to support the application for relief, so that the petition incorporates by reference and adopts the two memoranda, with their supporting affidavits and documents, as the grounds for the relief sought. Hence, the grounds thus set forth and urged as good cause for relief will be examined and stated, in conjunction with those raised at the oral hearing.

In the memorandum in support of the petition counsel review the testimony of fourteen of the twenty-three witnesses at the trial (Calvin Dennis not included) as "corroboratory of Calvin Dennis' testimony" and conclude that such summarizing of the evidence demonstrates that except for the testimony of Calvin Dennis "there is nothing that even remotely implicates petitioner except the blood stains—and his statement that he had had intercourse, but had obtained it the wrong way" (Brief, page 9) and that "without Calvin Dennis' testimony the conviction of petitioner could not stand." Thus the gist of the entire brief is that considering all corroborative evidence apart from the testimony of Calvin Dennis, which falls because he now retracts it and protests his innocence, the prosecution proved only that a crime was committed, without implicating petitioner in its commission.

The memorandum brief before the Judicial Council discusses some of the evidence, such as the failure of the expert witnesses to point out sufficient characteristics from the hair analyses to identify it as associated with any particular person (pages 3–4) and then launches into the real nub of the discussion that the conviction cannot stand because the petitioner's fundamental rights to be held only under legal process, to have counsel from the moment of incarceration, and not to be convicted by the use of an involuntary confession, have been violated (page 2). Thus, except as incidental to the joint discussion, this brief, although included in the petition by reference, has no real bearing on the instant case

because petitioner made no confession and is only remotely affected by the confessions of the others to the limited extent that they implicated him in the crime and resulted in his apprehension.

Thus, considering the petition and the supporting memoranda, all the matters incorporated therein by reference, and the points urged at the oral hearing, the grounds assigned as good cause for the relief sought narrow down to those which follow, each of which will be discussed separately herein.

First: What was the legal status of petitioner at the time of his arrest and detention by the United States naval authorities on Guam on 7 January 1949?

This point has particular reference only to the confessions of Calvin Dennis and Herman P. Dennis, Jr., and the alleged violation in their procurement of rights to counsel, to prompt arraignment and trial, and to protection against self-incrimination. As pointed out, this petitioner made no confession, and consequently the argument on this point has no pertinence to his conviction except that incidentally the confessions of the others gave the necessary clues to effect petitioner's apprehension. It will suffice to state here that this argument regarding the rights of the three men under the Penal Code of Guam after their arrest and detention by the Department of the Navy authorities was made before the Judicial Council, and the opinion and holdings of that body on the legal points raised, in which I concur, appear in ACM 1892, *Herman P. Dennis, Jr.*, 4 Court-Martial Reports (AF) 872. My con-

clusions in the matter also appear in a Memorandum Opinion accompanying my action upon the companion petition for a new trial or other relief filed on behalf of Calvin Dennis.

Second: What was the legal status of this petitioner at the time of his court-martial beginning 27 May 1949 with regard to the admission in evidence of the confessions of his two accomplices in their separate trials.

This point comes as a corollary to the "First." As has already been pointed out, this petitioner made no confession and hence the point has no pertinence to this case. The testimony of Calvin Dennis, who was tried separately and found guilty by a general court-martial of the same offenses as those of which the petitioner was convicted, was the principal evidence upon which the prosecution relied to connect petitioner with the offenses and establish his guilt. The coherence of this testimony, its voluntary character, and its consistency in every respect with the corroborative evidence, will be discussed hereafter in this opinion.

Third: Consideration of the affidavits of Calvin Dennis stating that his testimony at the trial of this petitioner was false and was prompted by the promise of a relatively light sentence.

These affidavits of Calvin Dennis were signed on 24 August 1951 and 6 September 1951, long after his trial, conviction, and sentence. They were preceded by at least one previous attempt prior to trial to repudiate the statements at petitioner's insistence, which repudiation was later retracted and the truth of the original statements affirmed. In effect the affidavits purport to re-

fract as false all testimony given by Calvin Dennis in the trial of this case, and indirectly they attack his own statements on the grounds of promises, threats, and coercion. This present position of Calvin Dennis is complicated by the position he voluntarily took at the trial of his case when the defense specifically stated that there was no objection to receiving the statements in evidence, for his defense was predicated upon the theory that the statements reflected the truth. The statements admitted that Calvin Dennis was at the scene of the original assault but did not admit that he was at the scene of the crime and asserted his lack of participation in the crime and his ignorance of the plan of his accomplices to commit it. The insistence by Calvin Dennis upon the truth of the statements because they were favorable to him, and the making of no claim at his trial that the statements were improperly obtained, prompts an inference that the affidavits are insincere. If the court had believed that his statements were true in their entirety, Calvin Dennis would now stand innocent and free; and the conclusion is inescapable that the affidavits are the result of ulterior motives, for he now has nothing to lose by giving them. The testimony, statements, or confessions of an accused accomplice are not to be summarily disregarded because he subsequently, for some motive, changes, qualifies, or retracts them. If the accomplice confesses, or testifies against his co-accomplice and "he changes or qualifies or retracts, as he sometimes does, as hope or interest or fear sways him, his testimony or confession is not to be summarily discarded, but to be judged of by confirming or oppos-

ing circumstances as well as by his character and the influences that may invest him." (*Valdez* v. *United States*, 244 U. S. 432). If his testimony was consciously and corruptly false, as Calvin Dennis now asserts, such a self-imposed indictment of his own character offers little to inspire confidence or recommend credence in his affidavits. When he testified at the trial of petitioner he repeatedly asserted that he did so voluntarily with full knowledge of his rights, and he sustained himself through a searching cross-examination. So on this point I must accept Calvin Dennis' testimony at the trial, with the ample corroboration furnished by the other witnesses, rather than his statements in these affidavits, as presenting the true version of petitioner's participation in the crime.

Fourth: Consideration of the affidavits of Mr. Edward F. Daly and Miss Mary Louise Hill as tending to support the theory of the involuntary nature of Calvin Dennis' confessions and his testimony at the trial of this petitioner, and as reflecting upon the method of conducting the trial.

Counsel argued that the mentioned affidavits support the allegations that are made in the petition with regard to the involuntary nature of the confessions of Calvin Dennis, and his testimony at the trial of petitioner, and in addition, they make serious charges against the method of conducting these entire proceedings in Guam. In their memorandum in support of the petition counsel review the testimony of the witnesses in this case and they conclude that there was little if any basis in the evidence for implicating petitioner in the crime except for the testimony of

Calvin Dennis, without which the conviction of petitioner could not stand. In my discussion of point "Third" I pointed out my reasons for concluding that the testimony of Calvin Dennis at the trial of petitioner, amply corroborated by other witnesses, will be preferred to the statements contained in his affidavits. Counsel recognize that if the testimony of Calvin Dennis in this case is permitted to stand, petitioner's guilt of the crimes of murder and rape is established beyond any doubt. I realize fully the extreme importance of such evidence, and with this in mind the testimony has been read and re-read to determine whether Calvin Dennis gave his testimony as the result of improper influence, and whether any clear reason is presented for his statement under oath at this juncture that "I perjured myself because threats were made against me that if I didn't so testify I would receive the death penalty, and that if I did so testify I would be rewarded by a relative light sentence." I find nothing of the sort in such testimony or elsewhere in the record. To the contrary, the record discloses not only that his testimony was consistent throughout with the corroborative evidence, but also that commendable care was taken to assure that Calvin Dennis appeared as a witness voluntarily and that no coercive influence was exercised upon him. For example, see the record of trial (pages 52, 53):

> Q. State your full name.
> A. Calvin Dennis.
> Q. Have you had your rights explained to you under the 24th Article of War?
> A. Yes, sir.

Q. Do you realize that you do not have to testify here today?

A. Yes, sir.

Q. Do you testify here voluntarily?

A. Yes, sir.

Q. Do you desire to testify today?

A. Yes, sir.

LAW MEMBER: Do you understand that anything you say here today may at some future date be used against you if it indicates that you have committed a crime?

WITNESS: Yes, sir.

LAW MEMBER: Nothing that has happened to you in the past will in any way protect you if your testimony before this court should happen to incriminate you in a crime? Do you understand that?

WITNESS: Yes, sir.

See also the record of trial at pages 70, 71, 74, and 75 as further proof of the precautions taken to assure that no coercive influence was exerted upon the witness. The Judicial Council and the Board of Review have concluded that Calvin Dennis was fully protected by the court when he testified at petitioner's trial; and a further reading of that testimony points inexorably to the conclusion that it was not procured by the employment of duress, artifice, or coercion. Where the evidence as to whether there was coercion is conflicting, or where different inferences may fairly be drawn from the admitted facts, the question whether a confession was voluntary is for the triers of the facts (*Lyons* v. *Oklahoma*, 322 US 596; *Lisenba* v. *California*, 314 US 219). This rule applies with equal force to the repetition by Calvin Dennis of the substance of his confessions as testi-

mony in the trial of petitioner, and the court's decision on the voluntary nature of the testimony, arrived at from first-hand hearing and observation, is presumptively correct and will not be disturbed unless manifestly erroneous (*MGM Corporation* v. *Fear,* 104 F. 2d 892; ACM 3597, *Maddle,* 4 Court-Martial Reports [AF] 573).

It should also be noted that insofar as the affidavits make charges reflecting upon the method of conducting these proceedings, Mr. Daly alone makes the assertions contained in his affidavits, and no further substantiation of these allegations has been presented. Further, the various allegations and charges of Mr. Daly as set forth in his affidavits, and the various statements of Miss Hill, were made the subject of an exhaustive investigation by the Directorate of Special Investigations, Office of the Inspector General, United States Air Force, both from the standpoint of the charges made and the motives for making the charges. I have again reviewed the results of this investigation and I can arrive at no different conclusion than that previously reached, that the charges are unfounded.

Fifth: *Prejudicial statements in the record.*

(a) It is contended by counsel that it was made to appear to the court that Calvin Dennis and Herman P. Dennis, Jr., were brothers. An affidavit of Calvin Dennis to the contrary was submitted in connection with his petition. The following appears in the record (page 58):

> Q. Who is Herman Dennis, do you know?
>
> A. Herman Dennis is supposed to be my half brother.

Counsel argue that such reference to blood relationship might have caused the court, in weighing the truth of the Dennis confessions and the testimony of Calvin Dennis implicating petitioner, to attach more weight and credibility to such evidence than if the two men had appeared to be unrelated. This argument has remote application to this petitioner; but in any event it is impossible to determine at this juncture whether the court would believe that a man making statements implicating his own brother would be impelled by higher motives of truth than an accomplice not so related, or whether, contrariwise, it would suspect ulterior design, and attach less credibility to such statements. But this determination involves conjecture and speculation of a high order, in which I am not required to indulge, because any conclusion reached by such process could have no value in determining the weight of the evidence. The court must be presumed to have taken into consideration all matters affecting the testimony of witnesses when weighing the evidence, prior to making its findings (*Larsen* v. *Portland S. S. Company* 66 F. 2d 326, 329) and I will not attempt to speculate in retrospect that the decision of the trial court on the credibility of witnesses could have been affected by evidence so intangible as that urged (*MGM Corporation* v. *Fear,* 104 F2d 892). Clear and convincing proof is required to set aside the judgment of a general court-martial, and matters of claimed injustice must be sustained "not as a matter of speculation but as a demonstrable reality" (*Adams* v. *United States ex rel. McCann,* 317 US 269, 281).

(b) It is also contended that the decision of the court finding petitioner guilty was affected by the testimony of the witness Miss Blackledge given in the trial of Herman P. Dennis, Jr., to the effect that that accused had stated to the witness his feeling of unhappiness at segregation, his unhappiness in the South, and his desire to take her picture. This testimony occurred only in the trial of Herman P. Dennis, Jr., (Record of Trial, in that case, page 77), and hence the argument of counsel based thereon can have no application to this petitioner.

Sixth: Petitioner was denied counsel of his choice.

Statements appear in the affidavit of Mr. Daly (October 1949) that raise the points that petitioner was denied counsel of his choice, and that his counsel "had one day in which to prepare his case and took approximately 1½ hours to put on his defense." It is sufficient to state that independent investigation heretofore referred to disproves these contentions. This investigation further proved to my satisfaction that the Commanding Generals were entirely within their prerogative as enunciated by paragraph 45a, Manual for Courts-Martial, USAF, 1949, in declaring as not available the counsel chosen by petitioner, former Lieutenant Colonel Edward F. Daly, and that they did not have ulterior motives, as is intimated, in declaring him (Daly) unavailable. But without regard to the legal rule that the determination of the availability of qualified defense counsel within the meaning of Article of War 11 is a matter exclusively within the dis-

cretion of the appointing authority whose determination is final (Manual for Courts-Martial, 1949, par 45a; *Hiatt* v. *Brown*, 339 US 103; ACM 2437, *Quinn*, 3 Court-Martial Reports [AF] 108) or the further rule that petitioner may not complain that he was inadequately represented by his deliberately selected counsel (*Adams* v. *Hiatt*, 79 F Supp 433; *Morton* v. *Welch*, 162 F 2d 840; *Setser* v. *Welch*, 159 F 2d 703; cert den 67 S Ct 1510), the record shows that capable counsel had been made available to petitioner, and that in open court he expressed a desire to be represented by individual counsel of his own selection, assisted by the regularly appointed defense counsel and assistant defense counsel as associates. Scrutiny of the record convinces me that petitioner was defended with loyalty, ability, and skill, which perforce attained for him the standards required by the concepts of a fundamentally fair trial (*Moss* v. *Hunter*, 167 F 2d 683; *Altméyer* v. *Sanford*, 148 F 2d 161; *Romero* v. *Squier*, 133 F 2d 528; *Liner* v. *Cozart*, 80 F Supp 540).

Seventh: Important evidence was withheld from the court at the trial.

Finally, it is contended that important evidence in the nature of Filipino identification discs (dog-tags) and a blood-stained Navy officer's uniform alleged to have been found in the vicinity of the crime about the time of its commission, was withheld from the court (Daly affidavit, dated 30 August 1951). Here again, this allegation was made the subject of a thorough investigation, from which I have concluded that the charge is baseless. Further, a presumption obtains that a

person acting in the capacity of a public officer performed his duties properly (Manual for Courts-Martial, 1949, par. 125a; Manual for Courts-Martial, 1951, par. 138a) and such presumption of regularity may be indulged as to officers charged with the administration of military justice (CM 320618, *Garner,* 70 Board of Review 71; CM 332704, *Bilbo,* 81 Board of Review 185) and as to courts charged with protecting fully the rights of an accused person (*Rudolph* v. *Lockwood,* 2 F. 2d 319; *Johnson* v. *Wilson,* 131 F. 2d 1). Therefore, I hold, there being no clear showing to the contrary, that the officers who investigated this case, prepared and preferred charges and prosecuted the case before the court, were not remiss in the performance of their duties. They were vested with wide discretion in developing and sorting the evidence to be used, and in choosing the witnesses conceived to be necessary to present the case properly, and the order and manner in which the evidence would be presented. Petitioner attempts to insinuate an element of doubt into the case by intimating that material evidence helpful to the defense was suppressed, but he fails to point out how such evidence was material to his defense, or how it affected or prejudiced him in any way. The force of such a suppositive argument is minimized by my own study of the reports of investigation of these matters, and I hold that in order to avail petitioner anything, such intimations and accusations must be supported by grounds less speculative and abstruse than those presented.

5. As previously stated, I have re-examined the reports of the comprehensive investigations

which were conducted at my request, and I have examined the entire records in this and its allied cases, in the light of the grounds set forth in the petition, and I hold that the petition presents no good cause for the relief sought, and that no injustice to petitioner is shown.

Therefore, no good cause for relief within the purview of Section 12, Act of 5 May 1950 (formerly Article of War 53) having been shown, the petition will be *denied*.

Signed REGINALD C. HARMON,
Major General, USAF,
The Judge Advocate General,
United States Air Force.

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